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

DONNA RADASZEWSKI,)
)
Plaintiff,)
)
vs.) No. 01 C 9551
) Judge John W. Darrah
JACKIE GARNER,)
)
Defendant.)

Response to Defendant's Motion for Judgment on the Pleadings

I. Introduction

This case involves a severely disabled young man--Eric Radaszewski-- who requires 24 hours a day of nursing in order to survive. The defendant sought to reduce funding for in-home skilled nursing services in August 2000 when Eric turned 21 to such an extent that he could no longer remain at home. The only option for him would be long-term institutionalization. Plaintiff challenged the defendant's decision to discontinue funding for in-home skilled nursing services for Eric by alleging such decision violates Title II of the Americans with Disabilities Act (ADA) as well as Section 504 of the Rehabilitation Act. Defendant consistently mis-characterizes this action as one in which plaintiff seeks to extract a new service from the state which it does not otherwise provide to any other person under the Medicaid program. Plaintiff, however, asserts that Illinois currently provides nursing and necessary medical services to Medicaid recipients in institutional settings but denies the same services to persons at home. Plaintiff further alleges that the cost of in-home nursing services is less than or equal to the cost of services Eric would require in an institution. (See Plaintiff's Supplemental Complaint, Count VI, pars. 40-41.)

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It is settled law that in a motion for judgment on the pleadings under FRCP 12(c), all well-pled allegations in the complaint are taken as true and that all reasonable inferences are drawn in favor of the plaintiff. Forseth v. Village of Sussex, 199 F.3d 363 (7th Cir. 2000). A defendant can prevail on a 12(c) motion only if "it appears beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief." Thomason v. Nachtrieb, 888 F.2d 1202 (7th Cir. 1989). The plaintiff's allegations that Illinois presently provides Medicaid coverage for skilled nursing and other medical services in an institution but not alternative skilled nursing services in the home, and that the cost of in-home services is equal to or less than the cost of institutional services, must be taken as true for purposes of the present motion.

The central question of this lawsuit, then, is whether as a matter of law, defendant's refusal to cover cost-effective alternative treatment in a community based setting for Eric rather than segregated in an institution constitutes illegal discrimination in violation of the ADA and Section 504 of the Rehabilitation Act.

II. The ADA proscribes delivery of services in a manner that causes unnecessary segregation and affords persons with disabilities the right to sue to enjoin such segregation.

The ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation 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, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999), the Supreme Court decided that unjustified segregation of persons in institutions constitutes a form of discrimination based on disability prohibited by this provision. Olmstead involved two women with severe developmental disabilities and mental illness confined to Georgia's state-run

psychiatric hospital. They had been waiting for years for alternative treatment in a community-based program recommended by their physicians. Their guardians claimed that Georgia's policies limiting community based services available as an alternative to the institutional services they were relegated to violated the ADA. Georgia officials argued that they had not discriminated against the plaintiffs based on their disabilities, that the state was already using all available funds to provide home and community-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. 527 U.S. at 596-597.

In construing whether Title II's prohibition against discrimination encompasses unjustified institutionalization, the Court examined Congress' legislative findings stated in the ADA describing segregation as a form of discrimination. Congress found that:

> historically, society has tended *to isolate and segregate* individuals with disabilities, and despite some improvements, *such forms of discrimination* against persons 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 *forms of discrimination, including* ... failure to make modifications to existing facilities and practices ... and *segregation*. 42 U.S.C. §12101(a)(2),(3),(5). [527 U.S. at 588 (emphasis added)].

The Court next examined Congress' direction to the Attorney General to issue implementing regulations consistent with Title II and "with the coordination regulations. . . applicable to the recipients of Federal financial assistance under [§504 of the Rehabilitation Act]." 42 U.S.C. §12134(b). Among these §504 regulations expressly endorsed by Congress is the "integration regulation" requiring recipients of federal funds to "administer federal funds in the most integrated setting appropriate to the needs of qualified handicapped persons." 28 C.F.R. §42.51(d). The Court then set out the Attorney General's Title II regulation, 28 CFR

§35.130(d), modeled on this §504 regulation, which provides: "A public entity shall administer services, programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." Without ruling on the validity of the regulations, the Court looked to the regulations for guidance in interpreting the scope of proscribed discrimination under Title II, observing that the "well-reasoned views of agencies implementing a statute constitute a body of experience and informed judgment" aiding in judicial construction of a statute. 527 U.S. at 598. In light of the legislative history of the ADA, Congress' express findings that segregation is a form of discrimination, its directive to the Attorney General to issue implementing regulations consistent with §504's implementing regulations, and the impact unjustified institutionalization has on the lives of persons with disabilities, severely diminishing their basic human interaction, including their family relations, as well as the impact on the community, perpetuating unwarranted assumptions that persons with disabilities are unworthy of participating in community life, the Court concluded that unjustified institutionalization is discrimination prohibited by §12132 of the ADA. 527 U.S. at 600-603.

Without mentioning Olmstead, defendant argues that the text of the ADA does not prohibit unnecessary segregation of persons with disabilities, that the only support for the proscription comes from the integration regulation, 28 C.F. R. Sec. 35.130(d), and that under the Supreme Court's decision in Alexander v. Sandoval, 532 U.S. 275 (2001), a regulation not grounded in statutory text cannot give rise to an enforceable right. (Def. Mem. at pages 4-5). Sandoval, however, does not apply here. In Sandoval the Court held that because the text of Title VI of the Civil Rights Act of 1964 had been construed to proscribe intentional discrimination only, an administrative regulation prohibiting disparate impact discrimination as

well could not give rise to an enforceable right by private individuals. By contrast, in Olmstead the Court construed the statutory language of the ADA, looking to the regulations for guidance only, and concluded that unnecessary segregation of persons with disabilities in institutions is a form of discrimination prohibited by the statute itself. See, Ability Center of Great Toledo v. Sandusky, 181 F.Supp.2d 797, 801 (N.D. Ohio 2001), Frederick v. Dept. of Public Welfare, 157 F.Supp.2d 509, 538-539 (E.D.Pa. 2001)(similarly distinguishing Sandoval).

Defendant also argues that the statute does not require IDPA to provide Eric with in-home nursing services. Def. Mem. at pages 6-11. The statute does not itemize services that states must provide to persons with disabilities. What it prohibits, however, is unjustified delivery of services in an institutional setting only. Plaintiff alleges in Count VI of her Supplemental Complaint that the Illinois Medicaid program provides long-term care services for persons with disabilities in hospitals and skilled nursing facilities. Defendant admits this averment. Supplemental Complaint, Count VI, Par. 40, Defendant's Answer. Plaintiff also avers that in-home nursing care is the most integrated service setting for Eric and is at least as cost-effective as treatment he would receive in an institution. Supplemental Complaint, Count VI, Par. 41. Defendant denies this averment, but in pursuing this Motion, defendant must take the allegations of the Supplemental Complaint as true. Defendant's restriction of adequate long term care nursing and medical services for Eric in an institutional setting only is unjustified given the alternative cost-effective in-home nursing available to Eric. Defendant's termination of this appropriate and cost-effective home-based care constitutes unlawful discrimination under the ADA as the statute has been interpreted by the U.S. Supreme Court in Olmstead.

Defendant's statements that "Title II of the ADA is only an anti-discrimination statute

prohibiting public entities from excluding the disabled from governmental services, programs or activities" was rejected by the Supreme Court in Olmstead. This was, in fact, the position taken by the dissent. 527 U.S. at 616. All the cases defendant cites at pages 7 through 10 of her Memorandum either pre-date Olmstead (CERPAC v. Health and Hospitals Corporation, 147 F.3d 165 (2d Cir. 1998) (expressly declining to decide the ADA integration issue), Doe v. Pfrommer, 148 F.3d 73 (2d Cir. 1998), Hodges v. Smith, 910 F.Supp. 646 (N.D. Ga. 1995), Aughe v. Shalala, 885 F.Supp.1428 (W.D. Wash. 1995)) or do not involve facts similar to those in Olmstead or as alleged in the present case, where the state will cover long term care medical and nursing services in an institutional setting, but refuses to cover the home-based alternative nursing services that are just as cost effective (e.g., Wright v. Guiliani, 230 F.3d 543 (2d Cir. 2000)(integration was not at issue), Rodriguez v. City of New York, 197 F.3d 611 (2d Cir. 1999)(finding that personal safety monitoring services plaintiffs sought were not provided under any setting so failure to provide them to Alzheimer's patients in-home did not violate the ADA or the Rehabilitation Act), Townsend v. Quasim, 163 F.Supp.2d 1281 (W.D. Wash.2001)(state did not violate the ADA by excluding persons with excess income from home based services). To the extent these cases hold that unjustified segregation of persons with disabilities in institutions does not constitute discrimination prohibited under Title II of the ADA, they run afoul of the Supreme Court's decision in Olmstead.

III. Plaintiff May Properly Bring Her Claim Under Title II of the ADA Against Defendant Pursuant to Ex Parte Young.

In its Memorandum Opinion and Order entered on April 30, 2002 in this case, the Court found that the Eleventh Amendment to the Constitution did not bar Ms. Radaszewski's claim

under Title II of the ADA because she was seeking prospective injunctive relief against a state official, the Director of the Illinois Department of Public Aid , to remedy an alleged present violation of a federal statute as authorized by the decision of the United States Supreme Court in Ex Parte Young, 209 U.S. 123, 159-60 (1908). Relying on the Seventh Circuit's decision in Walker v. Snyder, 213 F.3d 344 (7th Cir. 2000), the defendant requests that this Court repudiate its April 30, 2002, decision and dismiss Ms. Radaszewski's Title II claim.

In Walker, a sight-impaired inmate of the Illinois Department of Corrections alleged a violation of Title II of the ADA for failure by the Department to accommodate his disabilities by furnishing books on tape, a brightly lit cell by himself, and transfer to a less restrictive prison. Walker v. Snyder, 213 F. 3d at 345.[1] The Seventh Circuit concluded that because Title II of the ADA forbids discrimination by "any public entity," a suit brought under the doctrine of Ex Parte Young was not possible because such a suit necessarily is a suit against individuals and the only proper defendant in an action under the ADA is the public body as an entity. Walker v. Snyder, 213 F. 3d at 347.

Two recent decisions of the United States Supreme Court, Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356, 121 S.Ct. 955 (2001), and Verizon MD. Inc. v. Public Service Commission of Maryland, 122 S.Ct. 1753, 2002 U.S. LEXIS 3787 (May 20,

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[1] The United States District Court had dismissed Walker's Title II ADA claim for failure to state a claim for which relief can be granted after determining that Walker had received the reading aids he was requesting and that his remaining claims were too vague to support relief. Walker v. Washington, 1998 U.S. Dist. LEXIS 9128 (N.D. Ill. June 11, 1998). Walker appeared pro se before the district court and the Seventh Circuit. Rather than affirm the district court's decision based upon that court's legal conclusion, that Walker had not stated a claim that justified relief, the Court of Appeals in three paragraphs found that Title II of the ADA was not legislation that abrogated Illinois' Eleventh Immunity and that the doctrine of Ex Parte Young did not apply to lawsuits brought under Title II of the ADA.

2002), have effectively overruled the Seventh Circuit's decision in Walker. Accordingly, this Court should not believe itself bound by the Walker decision and should permit this case to proceed to the merits on Ms. Radaszewski's Title II ADA claim.

Garrett was a suit brought under Title I of the ADA, 42 U.S.C. §12132 et seq., by disabled state employees alleging that the State of Alabama had discriminated in its employment practices. The complaint sought only damages. 531 U.S. at 360. The Court ultimately decided that Alabama was protected by Eleventh Amendment Immunity because Title I of the ADA was not legislation enacted under Section 5 of the Fourteenth Amendment. 531 U.S. at 374. However, the Court, after deciding that the Eleventh Amendment applied, expressly explained that the standards of Title I of the ADA could still be enforced by private individuals in actions for injunctive relief under Ex Parte Young.

> Our holding that Congress did not validly abrogate the State's sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under Ex Parte Young, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908). [531 U.S. at 374, n. 9.]

Since both Title I and Title II of the ADA apply to an "entity," the Court's determination that a private person can maintain a suit under the doctrine of Ex Parte Young under Title I also applies to suits brought under Title II. Title I of the ADA applies to a "covered entity." 42 U.S.C. §12112(a). The term "covered entity" under the statute does not refer to individuals. "The term 'covered entity' means an employer, employment agency, labor organization, or joint labor-management committee." 42 U.S.C. §1211(2). Similarly, Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded

from participation in or be denied the benefit of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. §12132. Indeed, the Supreme Court's decision in Garrett regarding the availability of Ex Parte Young was made notwithstanding a line of decisions that had found that suits generally under the ADA, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e(b), and the Age Discrimination in Employment Act, 42 U.S.C. §630(b), had to be brought against the employer as an entity, rather than against an individual. See, EEOC v. AIC Security Investigations, 55 F. 3d 1276, 1280-1281 (7th Cir. 1995), and cases cited therein.

Even more recently, within the last month, the United States Supreme Court decided Verizon MD. Inc. v. Public Service Commission of Maryland, 122 S.Ct. 1753, 2002 U.S. LEXIS 3787 (May 20, 2002). Verizon alleged that the Public Service Commission of Maryland and its individual members had violated a provision of the Telecommunications Act of 1966, 47 U.S.C. §252(e). Maryland asserted immunity from suit in federal court based upon the Eleventh Amendment. It argued that the doctrine of Ex Parte Young does not permit suit against the individual officials, the same argument that defendant Jackie Garner asserts in this case. The Court rejected that argument finding that Verizon could bring suit against the individual commissioners in their official capacities, pursuant to the doctrine of Ex Parte Young. In so ruling, the Court explained that the process that a court must undertake in determining the applicability of Ex Parte Young is a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." This Court has already found that Ms. Radaszewski has made these allegations in determining the

applicability of Ex Parte Young to this case.[2]

The Garrett and Verizon decisions that individual state officials may be sued is also consistent with the rationale of Ex Parte Young and the concept that it acts as a necessary fiction to prevent ongoing violations of federal law by government officials. In Ex Parte Young, 209 U.S. 123, 28 S. Ct. 441, 454 (1908) the Court explained that when the:

> act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complaints is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional.[3]

In Gregory v. Administrative Office of the Courts of the State of New Jersey, 168 F. Supp. 2d 319 (D. N.J. 2001), involving allegations of violation of Title II of the ADA, the court explained that the Ex Parte Young doctrine has been called an "obvious fiction" because when a state official is sued to enjoin the enforcement of an official state policy, the real party in interest is the state and the suit proceeds as if the state had been the named party. 168 F. Supp. 2d at 327-29.

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[2] The Court's decisions in Garrett and Verizon are consistent with its previous decisions regarding the liability of public entities by suits against officials brought against them in their official capacities. Kentucky, DBA Bureau of State Police v. Graham, 473 U.S. 159 (1985) involved a claim against a state enforcement agency for attorney's fees. The Court explained that in a suit against state officials in an official capacity action, "the entity's policy or custom must play a part in the violation of federal law. 473 U.S. at 166. In this case, Ms. Radaszewski has alleged that "[u]nder 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." (Supplemental Complaint for Injunctive Relief, Count VI, Paragraph 40). Moreover, the seminal case regarding the obligation of the state to provide services in the community rather than in institutions for appropriate disabled individuals, Olmstead v. L.C., 527 U.S. 581(1999), proceeded as a case against state officials for prospective injunctive relief no doubt under the authority of the doctrine in Ex Parte Young.

[3] The Supreme Court has extended the Ex Parte Young doctrine to violations of federal statutes as well as the United States Constitution. See Green v. Mansour, 474 U.S. 64(1985).

Thus, a suit against a state official under such circumstances is a suit against an entity, the state, and is permissible under Ex Parte Young. In Carten v. Kent State University, 282 F.3d 391 (6th Cir. 2002), a suit brought by a university student against university officials alleging a failure to accommodate his disability in violation of Title II of the ADA, the court rejected the argument that defendant makes here, that Title II of the ADA imposes its requirement only on public entities. Instead, the court found that under the doctrine of Ex Parte Young the state officials when acting in their official capacities are the entity. 282 F. 3d at 396.

Finally and overwhelmingly, the federal courts in this country, especially since the Supreme Court's decision in Board of Trustees of the University of Alabama v. Garrett, have determined that actions brought under Title II of the ADA may proceed under the doctrine of Ex Parte Young. Garrett was decided on February 21, 2001. Since that time, the Courts of Appeals for the Second Circuit, Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn, 280 F.3d 98, 115 (2nd Cir. 2001) (dicta), the Fifth Circuit, Reickenbacker v. Foster, 274 F.3d 974, 977 n. 9 (5th Cir. 2001) (dicta), the Sixth Circuit, Carten v. Kent State University, 282 F.3d 391, 396 (6th Cir. 2002) (suit by university student regarding accommodation of a disability), the Eighth Circuit, Klingler v. Brashear, 281 F.3d 776 (8th Cir. 2002) (suit alleging that fee charged for placards allowing use of accessible parking spaces to the disabled), and the Tenth Circuit, Armstrong v. Davis, 275 F.3d 849, 880 (10th Cir. 2002) (suit alleging failure to accommodate disabled prisoners) have so determined. Previously, the Court of Appeals for the Ninth Circuit had made a similar decision. Armstrong v. Wilson, 124 F.3d 1019, 1025 (9th Cir. 1997) (inadequate prison facilities for disabled prisoners). No court of appeals since Garrett has found to the contrary.

Similarly, since the Garrett decision at least nine United States district courts have applied the Ex Parte Young doctrine to proceedings brought pursuant to Title II of the ADA.[4] Most of these decisions have expressly followed footnote 9 of the decision in Garrett[5] and some have specifically rejected the argument that only an entity can be sued under Title II.[6] The law has been clarified since the Seventh Circuit's decision in Walker. A suit against a state official brought against that official in his or her official capacity for prospective injunctive relief is

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[4] Shepard v. Irving, 2002 U.S. Dist LEXIS 10189 (E.D. Va., June 5, 2002) (disabled college student seeking accommodation of her learning disability), A.A. v. Board of Educcation, Central Islip Union Free School District, 196 F. Supp. 2d 259 (E.D. N.Y. 2002) (suit challenging supervision of special education by State), Daigle v. Louisiana Dept. of Social Services, 2002 U.S. Dist. LEXIS 2436 (E.D. La, January 31, 2002) (suit by college student to obtain reasonable accommodation of her disability), Johnson v. State of Louisiana, 2002 U.S. Dist. LEXIS 1284 (E.D. La, January 18, 2002) (denial of financial aid to disabled college student), Fetto v. Sergi, 181 F. Supp. 2d 53, 75 (D. Conn 2001) (student challenging individual education plan), Parker v. Michigan Dept. of Corrections, 2001 U.S. Dist. LEXIS 18931 (W.D. Mich., November 13, 2001) (failure of prison to accommodate prisoner's disability), Gregory v. Administrative Office of the Courts of the State of New Jersey, 168 F. Supp. 2d 319, 330 (D. N.J. 2001) (hearing impaired man seeking accommodations in order to record court proceedings), Doe v. Sylvester, 2001 U.S. Dist. LEXIS 14233 (D. Del., September 11, 2001) (mentally impaired woman challenging restrictiveness of care), Doe v. Maine Dept. of Human Services, 156 F. Supp. 2d 35, 60 (D. Me. 2001) (challenge to Maine's disenfranchisement of persons under guardianship by reason of mental disability), Frederick v. Dept. of Public Welfare, 157 F. Supp. 2d 509, 531 (E.D. Pa. 2001) (institutionalized adults challenge segregation at state facilities).

[5] A.A. v. Board of Education, 196 F. Supp. 2d 259 (E.D.N.Y., April 18, 2002) (page cites not indicated in decision), Daigle v. Louisiana Dept. of Social Services, 2002 U.S. Dist. LEXIS 2436 (E. D. La., January 31, 2002), Johnson v. State of Louisiana, 2002 U.S. Dist. LEXIS 1284 (January 18, 2002), Fetto v. Sergi, 181 F. Supp. 2d at 57, Parker v. Mich. Dept. of Corrections, 2001 U.S. Dist. LEXIS 18931 (W.D. Mich., November 13, 2001), Gregory v. Administrative Office of the Courts of New Jersey, 168 F. Supp. 2d at 327, Doe v. Sylvester, 2001 U. S. Dist LEXIS 14233 (D. Del., September 11, 2001), Frederick v. Dept of Public Welfare, 157 F. Supp. 2d at 531.

[6] A.A. v. Board of Education, 196 F. Supp 259, Gregory v. Administrative Office, 168 F. Supp. 2d at 328 - 329, Doe v. Sylvester, 2001 U.S. Dist. LEXIS 14233, Doe v. Maine Dept. of Human Services, 156 F. Supp. 2d 35.

permissible.

IV. Section 504 of the Rehabilitation Act Also Proscribes Unnecessary Segregation of Persons With Disabilities in the Delivery of Services, and Affords Individuals With Disabilities the Right To Sue to Enjoin Such Segregation.

The parties agree that §504 of the Rehabilitation Act (29 U.S.C. §784(a)) is materially identical to and the model for the ADA except that it is limited to programs receiving federal financial assistance. Def. Mem. P. 13. They further agree that courts apply the same standards for deciding claims based on Title II of the ADA and §504. Id. Defendant argues, as she did with respect to Title II of the ADA, that unlawful discrimination under §504 does not encompass unjustified segregation in the delivery of services. Def. Mem. p. 11. Although the Rehabilitation Act does not expressly define unjustified segregation in the delivery of services as a form of discrimination, the Attorney General's implementing regulation, 28 CFR §41.51(d), does. As described in the Section II, above, this regulation served as a guide to the Olmstead Court for interpreting Congress' intent in the ADA. Congress confirmed its approval of the Attorney General's §504 integration regulation in the text of the ADA directing the Attorney General to issue regulations implementing the ADA consistent with those that had been issued for the Rehabilitation Act. Congress' affirmation of the Rehabilitation Act's regulations is also clear in §12202(a) of Title II of the ADA which states: ". . . except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard that the standards applied under . . . the Rehabilitation Act of 1973 or the regulations issued by Federal agencies pursuant to such title." Such affirmation by Congress gives regulations the force of law. Bragdon v. Abbott, 524 U.S. 624, 631 (1994). See also, Helen L. v. DiDario, 46 F.3d 325, 332 (3d Cir. 1995), and Frederick v. Dep't of Public Welfare, 157 F. Supp.2d 509, 534-5 (E.D. Pa.

2001).

Defendant's reliance on Alexander v. Choate, 469 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985), is not apposite to the issue presented here. The Supreme Court held in Alexander that the state's decision to limit hospitalization coverage for Medicaid recipients to 14 days annually did not violate the Rehabilitation Act even if it in some degree adversely affected persons with severe medical disabilities more than persons without such disabilities. The case did not address whether the scope of unlawful discrimination prohibited under the Rehabilitation Act includes unjustified segregation in the delivery of services by an entity receiving federal funds. Helen L. v. DiDario, 46 F.3d at 335-6.

Defendant also argues at some length that "the financial obligation Plaintiff seeks to impose on the states is potentially enormous, and indeed could be ruinous." Def. Mem. pp. 12-13. But this argument ignores the actual allegations of Plaintiff's claim--that the in-home nursing services Eric has been receiving for the past 7 years are as cost-effective as the alternative long-term institution based care that the Medicaid program would pay for. Defendant must take these allegations as true for purposes of her Motion. The evidence in this case will show that from 1995 until Eric turned 21 in 2000, defendant approved the in-home nursing services that have allowed Eric to remain at home through IDPA's Medicaid Home and Community-Based waiver program for critically ill children.[7] That program covers in-home services as an alternative to the services these children would otherwise receive in a hospital or skilled pediatric nursing facility to the extent that the in-home services are as cost-effective as the institutional services. For the

[7] In a brief responding to a motion on the pleadings, a plaintiff may include additional narrative describing facts not included in the complaint. Forseth v. Village of Sussex, 199 F.3d 363, 368 (7th Cir. 2000).

five years preceding his 21st birthday, IDPA approved the extensive in-home skilled nursing services for Eric. A necessary judgment for that approval was that the skilled nursing services were cheaper than the institutional placement. Eric's needs and the associated costs for his in-home treatment versus in a hospital/institutional setting did not change when he became 21. The only change that occurred was IDPA's policy and practice to severely restrict home-based services for adults, forcing them into institutions once they turn 21. As Congress has recognized in the ADA, including in its confirming approval of the Rehabilitation Act's regulations within the text of the ADA, such institutionalization, no matter how benignly intentioned, has a devastating impact on persons with disabilities, depriving them of the incidents of family and community life integral to achieving the most minimal quality of life persons without disabilities enjoy. It is this segregation in delivery of services which is prohibited by the Rehabilitation Act and by Title II of the ADA.

For the reasons described with respect to plaintiff's Title II ADA claim above, defendant's termination of the appropriate in-home skilled nursing services it had approved for Eric for the six years before he turned 21 as a cost-effective alternative to the long term institution based services covered in the Illinois Medicaid program, violates Sec. 504 of the Rehabilitation Act.

V. Conclusion

For the foregoing reasons, plaintiff respectfully requests that Defendant's Motion for Judgment on the Pleadings be denied.

Respectfully submitted,

One of plaintiff's attorneys

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Certificate of Service

The undersigned certifies that on June 18, 2002, she served a copy of the attached Response to Defendant's Motion for Judgment on the Pleadings, upon:

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by depositing a copy thereof, enclosed in an envelope, in the United States Mail at Carol Stream, Illinois, with proper postage prepaid as addressed above, and by transmitting a copy thereof by facsimile to the facsimile number noted under the respective names above.

Susan C. Beard

SUBSCRIBED AND SWORN TO
before me this 18th day
of June, 2002.

Cynthia A. Autry

NOTARY PUBLIC

OFFICIAL SEAL
CYNTHIA A AUTRY
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES:03/26/05