UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

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

ARGUMENT

I. Count VI: Plaintiff's ADA Claim

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

Plaintiff incorrectly asserts that Defendant requests this Court to repudiate its April 30, 2002 decision that the Eleventh Amendment does not bar her claim under the Americans with Disabilities Act ("ADA"). Memorandum Opinion and Order, p. 10. Rather, as is patently clear from Defendant's Memorandum in Support of Her Motion for Judgment on the Pleadings, p.4, Defendant actually contends that Plaintiff cannot, under the terms of Title II of the ADA itself, sue the Director of the Illinois Department of Public Aid ("IDPA"). Plaintiff names only IDPA's Director as defendant in this case, although Title II of the ADA only prohibits discrimination in benefits provided by a "public entity," 42 U.S.C. §12132, which is limited to "any State or local government" and "any department, agency, special purpose district, or other instrumentality" of these governments. 42 U.S.C. §12131(1)(A) and (B). In Walker v. Snyder, 213 F.3d 344, 347

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(7th Cir. 2000), an action for injunctive-type relief brought against the Director of the Illinois Department of Corrections, the Seventh Circuit Court of Appeals held that "the only proper defendant in a action under [Title II of the ADA] is the public body as an entity." *See also* Lewis v. New Mexico Department of Health, 94 F.Supp.2d 1217, 1232 (D. N.M. 2000) (individual state officials could not be sued in their official capacities for declaratory and injunctive relief under Title II of ADA), *aff'd on other grounds*, 261 F.3d 970 (10th Cir. 2001).

The recent Supreme Court cases cited by Plaintiff do not overrule the Seventh Circuit's decision in Walker. Verizon Maryland Inc. v. Public Service Commission of Maryland, –U.S.–, 122 S.Ct. 1753, 2002 U.S. LEXIS 3787 (May 20, 2002), merely holds that the Tele-communications Act of 1996 did not prohibit a suit seeking injunctive relief against state commissioners in their official capacities and thus has no direct bearing on the present case, which is brought under Title II of the ADA. In Board of Trustees of the University of Alabama v. Garrett, – U.S.–, 121 S.Ct. 955 (2000), the Supreme Court held that Title I of the ADA does not abrogate States' Eleventh Amendment immunity from suits for money damages, but, in dictum contained in a footnote, suggested that Title I could still be enforced by private individuals in Ex parte Young actions for injunctive relief. –U.S. at –; 121 S.Ct. at 968, fn. 9. Recognizing that Title II of the ADA, which deals with discrimination in governmental services, has different remedial provisions from Title I, which deals with employment discrimination and covers private as well as state employers, the Court expressly limited its decision in Garrett to Title I. –U.S. at –; 121 S.Ct. at 960, fn. 1. Although the Supreme Court in Olmstead v. L.C. by Zimring, 527 U.S. 581, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999), entertained a Title II suit for injunctive relief brought against state officials, no issue was raised concerning the suability of these officials under Title II and therefore Olmstead is not dispositive of the present case.

Plaintiff cites various federal appellate and district court cases for her contention that official capacity suits for injunctive relief can be maintained under Title II of the ADA, but none of them are from the Seventh Circuit. Respose to Defendant's Motion for Judgment on the Pleadings ("Plaintiff's Response"), pp. 11-13. Walker remains controlling in this jurisdiction. Although the District Court in Boudreau v. Ryan, 2001 WL 840583, *6 (N.D. Ill. 2001), *app. pndg.* No. 02-1730 (7th Cir.), questioned Walker in light of the dicta in Garrett, it nonetheless deemed itself bound by the Seventh Circuit's holding in Walker and dismissed a Title II ADA claim brought against various state officers in their official capacities, including IDPA's Director. This Court must do likewise here, for a federal district court is obliged to follow the law of its circuit rather than contrary appellate and district court opinions rendered elsewhere. United States v. Krilich, 178 F.3d 859, 861 (7th Cir. 1999); United States v. Glaser, 14 F.3d 1213, 1216 (7th Cir. 1994).

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

In asserting a right to compel IDPA to provide her son with in-home private duty nursing, Plaintiff emphasizes the reliance placed by the Supreme Court in Olmstead v. L.C. by Zimring, 527 U.S. 581, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999), on Congressional ADA findings and agency regulations implementing the ADA and the Rehabilitation Act. Plaintiff attempts to stretch the "qualified" right of deinstitutionalization established in the Olmstead decision, 527 U.S. at 587; 119 S.Ct. at 2181, to cover an entirely different situation, one where the State, instead of being required to extend existing community based service programs to institutionalized mentally disabled persons, would be forced to undertake affirmative action by creating and funding a special new in-home nursing service so that an adult disabled individual can avoid institutionalization. The parties in Olmstead, however, did not challenge the

community integration regulations as outside congressional authorization and the Supreme Court recited these regulations with the express caveat that it was not determining their validity. 527 U.S. at 592; 119 S.Ct. at 2183. Furthermore, in Olmstead "existing state programs provided community-based treatment of the kind for which [plaintiffs] qualified." 527 U.S. at 595; 119 S.Ct. at 2184. Olmstead did not impose an affirmative action obligation on States to create new services especially to keep the disabled out of institutions. Rather the Supreme Court specifically declined to hold that the ADA requires States to provide a certain level of benefits to the disabled and merely held that "States must adhere to the ADA's nondiscrimination requirement with regard to the *services they in fact provide*." (emphasis added) 527 U.S. at 603, fn. 14; 119 S.Ct. at 2188, fn. 14. Under Olmstead, unlawful discrimination occurs only if institutionalized disabled persons are denied participation in existing alternative community programs.

Defendant has no quarrel with the unexceptionable proposition that the ADA and its implementing regulations are concerned with the segregation of the disabled. Such concern is consistent with Title II's express prohibition against exclusion of the disabled from receiving government services. 42 U.S.C. §12132. This statutory antidiscrimination provision, however, does not require States to create new services for the disabled and, to the extent that Plaintiff attempts to interpret the ADA's community integration regulation, 28 C.F.R. §35.130(d), as such an affirmative action mandate, the regulation is contrary to ADA itself and hence unenforceable. Generalized Congressional findings equating institutional isolation with segregation and a vague regulatory directive to administer services in the "most integrated setting appropriate" to the needs of the disabled, 28 C.F.R. §35.130(d), are insufficiently specific to impose an affirmative action mandate on the state. The findings and regulation do not indicate that instutionalization per se is prohibited discrimination or that the state must expend whatever funds are necessary to

keep every disabled person who could be maintained at home out of an institution. In his concurrence in Olmstead, Justice Kennedy pointedly distinguished prohibiting discrimination in dispensing existing State medical services from requiring a State without a program in place to create one:

> No State has unlimited resources and each must make hard decisions on how much to allocate to treatment of diseases and disabilities. . . . The judgment, however, is a political one and not within the reach of the statute. Grave constitutional concerns are raised when a federal court is given the authority to review the State's choices in basic matters such as establishing or declining to establish new programs. It is not reasonable to read the ADA to permit court intervention in these decisions.

527 U.S. at 612-13; 119 S.Ct. at 2176.

To substantiate that a federal statute creates a particular enforceable right, a plaintiff must demonstrate that the alleged right is not so vague and amorphous that its enforcement strains judicial competence and that the statute unambiguously imposes a binding state obligation. Blessing v. Freestone, 520 U.S. 329, 340, 117 S.Ct. 1353, 1359, 137 L.Ed.2d 569 (1997). In the present case, Plaintiff has failed to do either. Actually, a legion of cases hold that the ADA does not require States to create new services for the disabled. *See* Defendant's Memorandum in Support of Her Motion for Judgment on the Pleadings, pp. 7-8. Plaintiff's interpretation of 28 C.F.R. §35.130(d) as requiring IDPA to create new in-home nursing services for her son is squarely contrary to the ADA itself and any enforcement of this regulation in conflict with its enabling statute was interdicted by the Supreme Court in Alexander v. Sandoval, 532 U.S. 275, 121 S.Ct. 1511, 1519, 149 L.Ed.2d 517 (2001), which held that regulations cannot prohibit conduct permitted by their enabling statute.

The cases cited by Plaintiff are not on point with the instant case and thus do not uphold her interpretation of 28 C.F.R. §35.130(d) as creating an enforceable right to compel IDPA to

create new in-home nursing services for her son. Ability Center of Greater Toledo v. City of Sandusky, 181 F.Supp.2d 797 (N.D. Ohio 2001), dealt with whether Title II and its regulations established a private cause of action against disparate impact discrimination, not whether they created a private cause of action to compel public entities to create new services for the disabled. Frederick L. v. Department of Public Welfare, 157 F.Supp.2d 509, 536-39 (E.D. Pa. 2001), is also apparently confined to the question of whether the Rehabilitation Act, the ADA and their implementing regulations create a private right of action against disparate impact discrimination. Moreover, Frederick L., like Olmstead itself, only involved the discharge of institutionalized individuals from state psychiatric hospitals into existent state-funded community-based programs. 157 F.Supp. at 513. The court in Frederick L. conceded that plaintiffs' ADA claims would have to be dismissed in accordance with Sandoval "if [28 C.F.R. §35.130(d)] required action or inaction beyond what is required by the [ADA] itself." 157 F.Supp. at 539. Yet action beyond what is required by the ADA itself is precisely what is sought by Plaintiff in the present case, who erroneously interprets 28 C.F.R. §35.130(d) as requiring state and local governments to create whatever new in-home services are necessary to keep the disabled out of nursing homes.

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

Plaintiff egregiously overreads the Supreme Court's decision in Olmstead v. L.C. by Zimring, 527 U.S. 581, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999), as a general deinstitutionalization mandate which prohibits governments from providing services only in institutional settings and requires them to create and fund whatever programs are necessary to keep the disabled out of institutions. Olmstead only involved a situation where disabled individuals were not being deinstitutionalized into "existing state programs [which] provided community based treatment." 527 U.S. at 595; 119 S.Ct. at 2184. The Supreme Court itself, however, cautioned

that it was not holding that the ADA imposed a standard of care for whatever medical services States render or that the ADA requires States to provide a certain level of benefits to the disabled. 527 U.S. at 603, fn. 14; 119 S.Ct. at 2188, fn. 14. Rather the Supreme Court merely held that "States must adhere to the ADA's nondiscrimination requirement with regard to the *services they in fact provide.*" (emphasis added) 527 U.S. at 603, fn. 14; 119 S.Ct. at 2188, fn. 14. Therefore if a State does not provide community care and offers only institutional services to the disabled, it does not discriminate against the disabled and need not create new community based services in order to to keep the disabled out of institutions.

Plaintiff cites not even a single case in support of her proposition that IDPA must fund new in-home nursing services just so that her son might not have to receive care in a nursing home. Defendant, on the other hand, has already cited post-Olmstead cases holding that the ADA does not contain an affirmative action mandate requiring States to create new services for the disabled. *See* Wright v. Giuliani, 230 F.3d 543, 548 (2d Cir. 2000); Rodriguez v. City of New York, 197 F.3d 611, 618-19 (2d Cir. 1999); Townsend v. Quasim, 163 F.Supp.3d 1281, 1285-87 (W.D. Wash. 2001); Charlie H. v. Whitman, 83 F.Supp.476, 501 (D. N.J. 2000). Rodriguez and Townsend distinguish Olmstead as inapplicable to situations where new services are sought for the disabled. The court in Rodriguez deemed Olmstead inapposite to its decision that New York did not have to provide home saftety monitoring services to disabled Medicaid recipients because Olmstead addressed only the question of *where* existent treatment programs should be provided, not *whether* community-based treatment must be provided. 197 F.3d at 619. The court rejected any contention that, under Olmstead, States must provide the disabled with the opportunity to remain out of institutions. 197 F.3d at 619. In the court's view, Olmstead only prohibited States from discriminating regarding services actually provided. 197 F.3d at 619. The

court concluded:

> [Plaintiffs] want New York to provide a new benefit, while *Olmstead* reaffirms that the ADA does not mandate the provision of new benefits. Under the ADA, it is not our role to determine what Medicaid benefits New York must provide. . . . Rather, we must determine whether New York discriminates on the basis of a mental disability with regard to the benefits it does provide. Because New York does not "task" safety monitoring as a separate benefit for anyone, it does not violate the ADA by failing to provide this benefit to [plaintiffs].

197 F.3d at 619

Likewise, Olmstead did not prevent the court in Townsend from holding that the ADA did not require the State to develop and fund community-based services for certain disabled Medicaid recipients because the issue of whether a State must provide additional services where it does not already offer a community-based program was not presented or addressed in Olmstead. 163 F.Supp.2d at 1285-86. Echoing Rodriguez, Townsend confirmed that Olmstead only requires States to adhere to the ADA's nondiscrimination requirement with regard to services already provided. 163 F.Supp.2d at 1287. The court stated:

> The ADA mandates that if such a [community-based] program existed, then the medically needy must be placed in the most appropriate integrated setting. Exclusion for such programs would constitute discrimination. However, because Washington state does not provide community-based programs to the medically needy, the integration mandate [contained in 28 C.F.R. §35.130(d)] does not require their creation.

163 F.Supp.2d at 1287. Rodriguez and Townsend are post-Olmstead decisions where plaintiffs tried to require the State to create new community-based services as alternatives to nursing home institutionalization. These cases are exactly on point with the present case and should be outcome determinative here. *See also* Fetto v. Sergi, 181 F.Supp.2d 53, 75-76 (D. Conn. 2001) (State did not violate ADA and 28 C.F.R. §35.130(d) by providing certain services to disabled children in residential facilities, but not for children who remained at home).

II. Count VII: Plaintiff's Rehabilitation Act Claim

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

In arguing that the ADA contains an affirmative action mandate requiring States to create new services for the disabled in order to keep them out of nursing homes, Plaintiff relies on the Rehabilitation Act, 29 U.S.C. §794(a), and Congress' subsequent affirmation, in enacting the ADA, of a community integration regulation, 28 C.F.R. §41.51(d), promulgated to implement the Rehabilitation Act. Plaintiff, however, fails to demonstrate that either the Rehabilitation Act or any of its implementing regulations have themselves ever *required* States to create new services for the disabled. Plaintiff cannot use the Rehabilitation Act to bootstrap her arguments under the ADA, given the Supreme Court's pronouncement in Southeastern Community College v. Davis, 442 U.S. 397, 411, 99 S.Ct. 2361, 2369-70, 60 L.Ed.2d 980 (1979), that the Rehabilitation Act does not impose an affirmative-action obligation on recipients of federal funds. *See also* Lue v. Moore, 43 F.3d 1203, 1206 (8th Cir. 1994) (Rehabilitation Act does not require invention of new programs); Parks v. Pavkovic, 753 F.2d 1397, 1407 (7th Cir. 1985) (Rehabilitation Act does not force States to create special programs for handicapped children); Conner v. Branstad, 839 F.Supp. 1346, 1355-56 (S.D. Iowa 1993) (Rehabilitation Act did not require creation of community based services). Indeed, the Supreme Court in Davis held that administrative agencies lacked authority under the Rehabilitation Act to impose an affirmative action obligation through implementing regulations. 442 U.S. at 411-12, 99 S.Ct. at 2370. Therefore, insofar as Plaintiff interprets 28 C.F.R. §41.51(d) as an affirmative action mandate, it is an unauthorized and invalid regulation under the Rehabilitation Act. As such, it runs afoul of both Davis and Alexander v. Sandoval, 532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001), and confers no enforceable right to require IDPA to create new in-home nursing services for Eric.

The cases cited by Plaintiff are distinguishable from the present case because they did not require creation of new community-based services for handicapped individuals. Frederick L. v. Department of Public Welfare, 157 F.Supp.2d 509, 513 (E.D. Pa. 2001), only involved the discharge of institutionalized individuals from state psychiatric hospitals into existent state-funded community-based programs. Helen L. v. DiDario, 46 F.3d 325 (3d Cir. 1995), only involved whether the Rehabilitation Act required the State to provide a nursing home resident with alternative home services under an existent attendant care program. The court noted that plaintiff was not asking the state to alter its requirements for admission to the attendant care program or requesting that the substance of the program be altered to accommodate her. 46 F.3d at 337. In the present case, however, this is precisely what Plaintiff requests. Illinois currently only provides in-home private duty nursing to children under 21 years of age under its Early and Periodic Screening, Diagnosis and Treatment Program ("EPSDT"). 305 ILCS 5/5-19(a). Extension of in-home nursing services to Plaintiff's son, who is an adult over 21 years old, would alter a basic eligibility requirement for the EPSDT program and substantially transform a program for children into one for adults. IDPA would, in both substance and effect, have to create an entirely new in-home nursing program--one that provides services for the entire adult disabled population as well as for children. Such a fundamental alteration in the nature of IDPA's existing EPSDT program is exactly the type of affirmative action that the Supreme Court held is not required by the Rehabilitation Act. *See* Southeastern Community College v. Davis, 442 U.S. at 411, 99 S.Ct. at 2369-70.

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

Plaintiff's argument that the ADA and the Rehabilitation Act require IDPA to provide her

son with in-home private duty nursing actually boils down to nothing more than a contention that IDPA must provide in-home services to the disabled if such services would be as cost-effective as alternative institutional care. However, Plaintiff's cost-effectiveness argument is not only rather misleading, it is also completely irrelevant. Plaintiff points out that IDPA approved in-home services nursing services for Eric until he turned 21 through a Medicaid Home and Community-Based waiver program for critically ill children. Plaintiff herself, however, acknowledges that that waiver 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." (emphasis added) Plaintiff's Response, p. 14. Since a hospital, in addition to a pediatric nursing facility, could have been used to set the upper-limit cost-effectiveness of in-home services under the childhood waiver program, IDPA's approval of in-home nursing services for Eric before he turned 21 did not then necessarily establish that the in-home services were more cost-effective than care in a nursing facility. Nor does IDPA's approval of in-home nursing services for Eric before he turned 21 necessarily establish that in-home nursing would currently be more cost-effective than care in an adult nursing facility.

Furthermore, Plaintiff's allegation that in-home private duty nursing would be as cost-effective as institutional care is at least partly belied by her own pleadings. Plaintiff also alleges that, (1) on February 18, 2000, Illinois' Office of Rehabilitation Services ("ORS") issued a decision limiting Eric's eligibility for home services under an adult waiver program ("HSP") to a "service cost maximum" of $4,593 per month, and (2) on August 18, 2000, IDPA issued an administrative decision affirming the ORS decision. Supplemental Complaint for Injunctive Relief, pp. 4, 5; ¶¶26, 30. As IDPA's administrative decision indicates, the service care

maximum for the HSP Medicaid Waiver Program is based on an amount no greater than would be expended to maintain the recipient in a nursing home. IDPA Final Administrative Decision, p. 2, ¶D, attached hereto as Exhibit A.[1] Yet the basic gravamen of Plaintiff's whole Complaint in the present case is that the $4,593 service cost maximum established for Eric under the HSP program, an amount based on the cost of nursing home care, is inadequate to pay for the amount of in-home private duty nursing he needs. This claim, however, contradicts any allegation Plaintiff could make that in-home private duty nursing is as cost-effective as nursing home care.

Finally, even assuming as true, for purposes of the instant Motion for Judgment on the Pleadings, Plaintiff's allegation that in-home care is at least as cost-effective as treatment Eric would receive in an institution, this cost-effectiveness argument is not sufficient to state an actionable claim under either the ADA or the Rehabilitation Act. In her initial Memorandum and in this Memorandum, Defendant has cited numerous cases holding that neither the ADA nor the Rehabilitation Act require the government to create new services for the disabled. Not only has Plaintiff has failed to cite any cases holding that the government must create new services for the disabled, she has also failed to cite a single case imposing such an affirmative action obligation on the government even when the alternative services whose creation is sought would be less expensive than existent institutional services. As regards the creation of new services for the disabled, neither the ADA nor the Rehabilitation Act override State discretion to select the particular services covered in its Medicaid program. Emphasizing the "substantial discretion" conferred on the states by the Medicaid Act to choose the precise coverage of their programs, the

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[1] On a motion for judgment on the pleadings, a court may consider documents incorporated by reference into the pleadings. United States v. Wood,925 F.2d 1580, 1582 (7th Cir. 1991).

Supreme Court in Alexander v. Choate, 469 U.S. 287, 303, 105 S.Ct. 712, 721, 83 L.Ed.2d 712 (1985), held that the Rehabilitation Act did not require a State to expand its Medicaid benefits on behalf of the handicapped. Even the statutory rights of the handicapped to be integrated into society did not require the State to make "fundamental" or "substantial" modifications to its Medicaid program in order to accommodate the handicapped. 469 U.S. at 300; 105 S.Ct. at 720.

Under the Medicaid Act, a State does not have to choose the least expensive options in selecting covered services. *See e.g.* Beal v. Doe, 432 U.S. 438, 445, 97 S.Ct. 2366, 2371, 53 L.Ed.2d 464 (1977) (State did not have to include nontherapeutic abortions in Medicaid coverage even if abortion was generally a less expensive medical procedure than childbirth). The ADA and Rehabilitation Act do not curtail State discretion in selecting Medicaid coverage because neither statute contains any proviso that the State must create entirely new or additional services for the disabled when such services would be cheaper than existing programs. The court in Townsend v. Quasim, 163 F.Supp.2d 1281 (W.D. Wash. 2001), specifically rejected exactly the same cost-effectiveness argument raised by Plaintiff in the present case. Plaintiffs in Quasim, who contended that the ADA's integration mandate required the State to provide home and community-based programs for certain disabled Medicaid recipients, also alleged that alternative community-based residences "would not generate direct costs exceeding the long-term care services now provided to the medically needy in nursing facilities." 163 F.Supp. at 1287. Although the court conceded that plaintiffs had made a "strong policy argument," this cost-effectiveness argument did not alter the court's holding that the ADA's integration mandate did not require a State to develop and fund a new community-based program for medically needy disabled Medicaid recipients. 163 F.Supp.2d at 1286, 1287. Plaintiffs' cost-effectiveness policy argument had to be addressed to the agency administering the State's Medicaid program rather

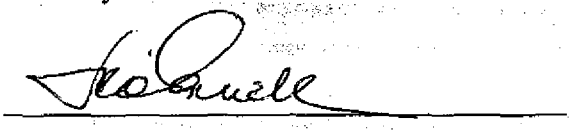
than to the courts. 163 F.Supp.2d at 1287. As the court observed in Skandalis v. Rowe, 14 F.3d 173, 182 (2d Cir. 1994), "Determinations of cost-effectiveness should be left to the expertise of the state and federal agencies that are responsible for administering the Medicaid program, as they bear political responsibility for its fairness and cost, and will be paying the bill." Because Plaintiff's allegations regarding the supposed cost-effectiveness of in-home private duty nursing raise merely a political policy argument without any legal force, Plaintiff has failed to state a claim for which relief can be granted under either the ADA or Rehabilitation Act. Therefore judgment on the pleadings must be entered in Defendant's favor in this case.

CONCLUSION

THEREFORE, for the reasons stated in her intitial Memorandum and 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: 

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See Case File For Exhibits