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

DONNA RADASZEWSKI, Guardian, on behalf of Eric Radaszewski,	)	
Plaintiff,	)	
vs.	)	No. 01 C 9551
BARRY MARAM, Director, Illinois Department of Healthcare and Family Services,	)	Judge John W. Darrah
Defendant.	)	

Plaintiff's Proposed Findings of Fact and Conclusions of Law

Plaintiff Donna Radaszewski, through counsel Prairie State Legal Services, Inc., submits proposed findings of fact and conclusions of law below. During trial, the Court made the factual finding that Eric Radaszewski, through his guardians, does not oppose community-based treatment. (Tr. p. 65, lines 12 through 15).

I. Proposed Findings of Fact:

1. Plaintiff Donna Radaszewski is the guardian for her disabled adult son, Eric Radszewski, and brings this action on his behalf. (Testimony of Donna Radaszewski, Tr. p. 35, ln. 3 through 4).

2. Defendant Barry S. Maram is the Director of the Illinois Department of Healthcare and Family Services (HFS), an agency formerly known as the Illinois Department of Public Aid. Mr. Maram is sued in this matter in his official capacity as the Director of HFS. (Parties' Stipulation of Uncontested Fact, #1,2).

3. Eric Radaszewski is eligible for and a participant in the Illinois Medicaid Program. (Amended Answer, Count VI, Par. 4).

4. In Illinois, HFS is the single state agency responsible for administering the Medicaid program. (Parties' Stipulation of Uncontested Fact, #4).

5. Illinois receives federal funds for the Medicaid program. (Parties' Stipulation of Uncontested Fact, #6).

6. Eric Radaszewski was born on August 5, 1979. (Amended Answer, Count VI, Par. 26) Eric turned 21 on August 5, 2000. (Parties' Stipulation of Uncontested Fact, #5).

7. Eric Radaszewski was diagnosed with medulloblastoma, a brain cancer, in 1992. (Amended Answer, Count VI, Par. 5).

8. After undergoing surgery, radiation, and chemotherapy to treat the cancer, Eric Radaszewski suffered a mid-brain stroke in 1993. (Amended Answer, Count VI, Par. 6).

9. The cancer, stroke, and medical treatment have impaired Eric's physical and mental functions and left him with multiple and complex disabilities. (Testimony of Michael E. Peters, M.D., Tr. pp. 100-119; Pl. Exh. 40, pp. DHS 10096-10098; Pl. Exh. 28A; Pl. Exh. 29A; Pl. Exh. 1,3,4,5,6,8,9,11,14).

A. State Officials Have Determined that Home Care is Appropriate for Eric Radaszewski

10. From 1995 until Eric's 21st birthday on August 5, 2000, Eric Radaszewski participated in a home-and-community-based care program known as the Medically Fragile Technology Dependent Children's Waiver (MFTD). (Pl. Exh. 1 - 16, Pl. Exh. 40, p. DHS 10096-10097).

11. The MFTD waiver helps families care for children who are technology dependent and require intensive skilled nursing care to live in their own home rather than in a hospital or skilled nursing facility when the cost would be less expensive than the cost to the State for the institutional care. (Pl. Exh.41, p.3795; Pl. Exh. 1, p. HFS 006933; Pl. Exh. 42, p. HFS 006984-6985).

12. According to Barbara Ginder, the HFS official who oversees the MFTD, the term "medically fragile" means that "a child has a condition that is very, very medically complex and is very difficult to provide care for without ongoing and continuous nursing." (Ginder Testimony Tr. p. 354, ln. 13 through 16).

13. Eligibility for the MFTD and the amount and nature of the services approved under the MFTD are based on a comprehensive evaluation of the child's needs by state officials, including physician consultants employed by HFS. (Pl. Exh. 41, pp. 003662,-3663, 3848, 3849, 3858, Pl. Exh. 56, pp. HFS 001875, 001879; Pl. Exh. 57, p. HFS 001906).

14. While Eric Radaszewski was in the MFTD, HFS' physicians repeatedly approved care plans for him which included 16 hours per day nursing care and 336 additional nursing hours for respite for his parents. (Pl. Exh, 1, HFS 006908; Pl. Exh. 3, p. HFS 006961; Pl. Exh. 4, p. HFS 007695; Pl. Exh. 5, p. HFS 00708; Pl. Exh. 6, p. HFS 006933; Pl. Exh. 9, p. HFS 007812; Pl. Exh. 12, p. HFS 001628).

15. Since 2000, when Eric turned 21, there has been no substantive difference in Eric Radaszewski's medical condition. (Peters Testimony, Tr. p. 108, ln. 10-11).

16. Eric's parents have learned how to care for Eric, and provide nursing care during the

eight hours of each day when nurses are not present caring for Eric. (Radaszewski Testimony, Tr. p. 66, ln. 18 through 24, pp. 70, ln. 10 through 19).

17. Prior to Eric's 21st birthday, state officials found Eric eligible for home care through the Home Services Program (HSP)[1]. (Jt. Exh. 2, Pl. Exh. 40, Finding C, p. DHS 10097).

18 The service plan approved for Eric in the HSP was limited to a cost cap of $4,593 per month, based on an exceptional care rate for a nursing facility. (Jt. Exh. 5; Radaszewski Testimony, Tr. p. 56, ln. 3 through 6; Napolski Testimony, Tr. p.186, ln. 19 through p.187, ln. 6).

19. The $4,593 per month cap would only be sufficient to cover approximately five hours per day of at-home nursing services for Eric. (Pl. Exh. 40, p. DHS 10097; Radaszewski Testimony, Tr. p. 56, ln. 7 through 23).

20. The service plan based on the $4,593 cap would not meet Eric Radaszewski's medical needs. (Napolski Testimony, Tr. p. 191, ln 9-11, Pl. Exh. 40, p.10097-10098, Pl. Exh. 1-14, Radaszewski Testimony, Tr. p. 56, ln. 24 through p. 58, ln. 8).

B. A Nursing Home Cannot Meet Eric Radaszewski's Medical Needs; He Requires a Hospital Level of Care

21. A nursing home cannot meet Eric Radaszewski's medical needs. (Peters Testimony, Tr. pp. 117-118, 138, Pl. Exh. 40).

22. Eric Radaszewski's medical condition is very complex, and requires both more extensive nursing services and more highly skilled nursing services than are available in a

[1] The terms Home Services Program (HSP) and Persons with Disabilities (PWD) were used interchangeably at trial. For purposes of these Proposed Findings of Fact and Conclusions of Law, plaintiff uses the term Home Services Program (HSP).

nursing home. (Peters Testimony, Tr. 117-118, 138; Pl. Exh. 40, pp. DHS 10097-10098).

22a. Eric lacks the brain functions that regulate the systems around the body, in particular the brainstem and pituitary functions which are vital to maintaining balances and normal function around the body. (Peters Testimony, Tr. p. 108, ln. 17-21). Eric has no meaningful pituitary gland function, has an active seizure disorder, and is in a chronic disease state with a chronic immune suppressive condition that causes him to be very prone to infections. (Peters Testimony, Tr. p. 106, ln. 9 - 18). Eric has suffered recurrent bouts of pneumonia, sepsis, urinary tract, soft tissue and other infections. (Peters Testimony, Tr. p. 109, ln. 6 - 14; Pl. Ex. 28A, Certification Period 6/1/07 - 7/30/07, p. 2; Pl. Exh. 29A).

22b. Because of the hormones that he has been given to compensate for his lack of a pituitary gland function, Eric has developed deformities of his bones and spinal column. He has developed a progressive spinal deformity which is affecting his ability to breathe. (Peters Testimony, Tr. p. 106, ln. 19 through p. 107, ln. 2). He has trouble breathing properly and is prone to aspirating food into his lungs. (Peters Testimony, Tr. p. 106, line 22-23). Eric is wheelchair dependent, and in efforts to increase his mobility has suffered bone fractures. (Peters Testimony, Tr. p. 109, ln. 24 through p. 110, ln 4).

22c. Eric has limited ability to communicate, and is unable to convey his symptoms. (Peters Testimony, Tr. p.109, line 16 -19)..

22d. Eric has a very complex set of medications. He needs 20 - 25 medications on a daily basis and ten additional medications given to treat various symptom as needed. (Peters Testimony, Tr. p. 110, ln. 6 - 24). He has a PICC line for intravenous administration of

medication and nutrition, and from which blood is drawn. (Peters Testimony, Tr. p. 110, ln. 9 - 14). He is prone to problems from interactions between the medications he receives. The administration of the medications has to be monitored constantly for adverse reactions. They can cause liver inflammation, stress on Eric's kidneys and further bone marrow suppression. (Peters Testimony, Tr. p. 110, ln. 25 through p. 111, ln. 12).

22e. Eric requires one-on-one skilled nursing care on a continuous basis. (Pl. Exh. 28A, Physician's Plans of Treatment for certification periods August 5. 2002 through July 30, 2007; Pl. Exh. 40, pp. DHS 10096-10098; Pl. Exh. 1,3,4,5,6,8,9,11,14).

22f. Nursing homes do not have sufficient staffing to meet Eric's needs. (Peters Testimony, p. 117, ln.17 through p. 118, ln.24).

23. Eric Radaszewski would be too vulnerable to infection in a nursing home. (Peters Testimony, Tr. p. 118, ln 25 through p. 119, ln. 10).

24. In 2000, an HFS hearing officer made a number of factual findings about Eric Radaszewski's eligibility for the Home Services Program and the level of care that Eric Radaszewski requires, including the following:

> A. Grievant is a 20 year old man who was diagnosed with a medulloblastoma in 1992. He underwent surgery and chemotherapy for that condition. As a result of that condition and treatment for that condition, he has many physical disabilities and has lost both brain and bodily functions. He has been cared for at home for the past 5 years through funding from the Illinois Division of Specialized Care for Children (DSCC). This care, plus the admirable efforts of his parents, has allowed Grievant to be cared for in his home. Grievant wishes to be maintained in his home with his family, this is also his parents' wishes.
>
> ....
>
> H. The uncontradicted evidence submitted by Grievant [Eric] is that the Grievant would be at risk of danger if he should be placed in a nursing home. Grievant's

> doctor testified that Grievant needs substantial one on one nursing care to survive. He is medically fragile, prone to infections, immobilized, catheterized and relies on oxygen. A registered nurse is required to look for problems before they become "full blown and he crashes," according to Grievant's doctor. His immunological responses were severely compromised due to earlier radiation and chemotherapy, so skilled nursing care is a "question of survival, not a question of doing well." The physician strongly urged that Grievant be given the funds to support 24 hours per day of skilled nursing care. Placing Grievant in a nursing home facility of the type suggested by the State, according to the physician, would result in Grievant being seriously medically compromised, which would lead to many hospitalizations.
>
> I. Grievant's physician's opinion was supported by the registered nurse in charge of Grievant's care. He described Grievant's medical needs in detail. Grievant has no sense of thirst, so his hydration must be carefully monitored in order to avoid serious medical complications. Although Grievant has difficulty swallowing, he can be given soft food, but only under careful conditions. His nutrition must be carefully monitored. Grievant cannot protect his airway by turning his head; any aspiration of food, liquid or medicine can become a medical emergency. Chronic sinus infections lead to sepsis, which can be rapid and acute. Grievant also has osteoporosis and is in danger of breaking bones. His risk of injury is high because he sometimes forgets he cannot walk. His short-term memory is not good and he is often confused. He also has difficulty with urination and elimination, which if left untreated, can result in medical emergencies. Grievant has to be under constant surveillance
>
> J. According to the expert witness offered by Grievant, Grievant could not get the level of required nursing care in a nursing home facility, including the facility suggested by the State (Alden Lincoln Park Nursing Facility). In her assessment for this hearing, the expert contacted several nursing homes (including Alden) and asked about the level of care provided. According to this witness, none would provide the level of care need by Grievant: 24 hour [s] per day by skilled clinical nurses. She based her assessment on the Grievant's medical file, her observation of Grievant, and her 20 years of experience as a skilled nursing professional.
>
> ....

(Pl. Exh. 40, p. DHS 10097-10098).

25. While Eric participated in the MFTD, state officials repeatedly found, based on detailed and extensive information about Eric's medical condition and nursing needs, that the alternative care setting for him if home care had to be abandoned was a hospital. (Pl. Exh. 1,p.

HFS 006929; Pl. Exh.3, p. HFS 006979, Pl. Exh. 4, p. HFS 007705; Pl. Exh. 5, p. HFS 007726; Pl. Exh. 6, p. HFS 007012; Pl. Exh.8, p. HFS 007775; Pl. Exh. 9, p. HFS 007877; Pl. Exh. 12, p. HFS 001634). HFS' physician consultant, Dr. Pfeiffer, specifically noted that a hospital would be the alternate care setting for Eric. (Pl. Exh. 9, p. HFS 007877).

26. Eric Radaszewski continues to require a hospital level of care. (Peters Testimony, Tr. p. 115, line 22 to p. 116, line 3).

C. Eric Requires The Equivalent of One-on-One Skilled Nursing Care in Whatever Setting He Would Be Placed

27. If institutionalized, Eric Radaszewski would require the equivalent of the private-duty nursing care that he has received at home. (Proposed Findings of Fact above, 21 through 26).

28. A hospital setting would provide the equivalent care to the care Eric receives at home with monitoring devices, telemetry and the increased nursing staffing available in hospitals. (Peters Testimony, Tr. p. 115, ln. 22 to p. 116, line 3, p. 136, ln. 9 through 23).

E. Extensive One-on-One Nursing Services Are Included in HSP Service Plans

29. Although HFS may not refer to the skilled nursing services available under the HSP as private duty nursing, HFS can and does make available funding for extensive one-on-one skilled nursing in the home to adult participants in the HSP, and HSP service plans may include 8 or more hours per day of skilled nursing care. (Ginder Testimony, Tr. p. 225, ln. 1-7).

30. The only limitation on the number of hours per day of skilled nursing care that may be included in an individual's HSP service plan is the fixed cost cap assigned to the individual.

(Ginder Testimony, Tr. p. 224, ln. 14-25).

D. Eric Radaszewski is a Qualified Person within the meaning of the ADA.

31. Eric Radaszewski is qualified for the HSP in the sense that he has severe long-term disabilities. (Peters Testimony, Tr. pp, 100-139, Pl. Exh. 40, Bates pp. DHS 10096-10098, Pl. Exh. 28A; Pl. Exh. 29A; Pl. Exh. 1,3,4,5,6,8,9,11,14).

32. Eric Radaszewski is qualified for the HSP in the sense that he is at risk for long term institutionalization. (Peters Testimony, Tr. p. 135, ln. 1 through 10, Pl. Exh. 40, pp. DHS 10096-10098, Pl. Exh. 28A; Pl. Exh. 1,3,4,5,6,8,9,11,14; Pl. Exh. 29A).

33. The State found Eric Radaszewski eligible for the HSP. (Pl. Exh. 40, p, DHS 10097, Finding of Fact C; Stipulation of the Parties with respect to Def. Exh. 46 as stated by the Court at Tr. p. 273, ln. 4-10).

34. Eric Radaszewski is eligible for and a participant in the Illinois Medicaid Program. (Proposed Finding of Fact, 3, above).

35. Eric Radaszewski is qualified for the HSP in the sense that home care is appropriate for him. (Proposed Findings of Fact 11 through 17, above; Peters Testimony, p. 115, ln. 7-21).

E. The Cost of Eric's Continued Care at Home Would Not Exceed the Cost of Care at the Hospital Level He Requires

36. The cost for Eric's continued care at home would not exceed the anticipated cost of caring for him in an institutional setting at the hospital level of care that he requires.

36a. HFS repeatedly determined that the cost of Eric's care in an institution would exceed the cost of his care in the community, including both the 16 hours per day skilled nursing he receives at home plus other ancillary medical costs. (Pl. Exh.1, p. HFS 006934-6935; Pl. Exh.

3, p. HFS 006981; Pl. Exh. 4, p. HFS 007707; Pl. Exh.5, p. HFS 007711; Pl. Exh. 6, p. HFS 007014; Pl. Exh. 9, p. HFS 007869). For example, in its last cost estimate preceding Eric's 21st birthday, the State estimated the institutional cost of his care if he were not cared for at home to be $29,330.40 per month ($968/day), while the cost of his care plan including 16 hours nursing services per day, supplies, equipment and other therapies totaled $20,868.19 per month ($688.71/day). (Pl. Exh. 14, p. HFS 007986).

36b. According to defendant's witness Matthew Werner, the cost of Eric's care in 2005 (the most recent year with complete data) was $20,499 per month ($676.53 per day). (Def. Exh. 3, p. HFS 009601; Werner Testimony, Tr. p. 566, ln. 19 through 20, p. 568, ln. 23 through 569, ln.4).

36c. The average Medicaid reimbursement rate for hospital stays longer than 120 days for persons age 21 or older was $1428 per day in July 1, 2004 through October 28, 2005 and hospital reimbursement rates have not decreased since that time. (Pl. Exh. 46, Ginder Testimony, Tr. p. 236, ln. 4 to p. 237, ln. 3).

36d. Under the Illinois Medicaid Program, HFS pays for long-term care for adults in the institutional setting they require, including skilled nursing facilities and hospitals. (Pl. Exh. 45, Paragraph 33 of the Amended Answer in *Sidell v. Maram;* Pl. Exh. 45A, Paragraph 33 of the Complaint in *Sidell v. Maram*).

36e. The Illinois' Medicaid program covers medically necessary hospitalization for adults. (Kopel Testimony, Tr. p. 209, ln. 16 through p. 210, ln. 2).

36f. Illinois does not own and operate facilities specifically for long-term care of persons with disabilities other than veterans nursing homes. (Kopel Testimony, Tr. p. 201, ln. 2-16).

Illinois' Medicaid program reimburses providers of medical services; it does not own and operate facilities. (Kopel Testimony, Tr. p. 201, ln. 17 through 20).

F. The Relief Plaintiff Seeks Would Not Fundamentally Alter Illinois' Programs and Services

37. The relief plaintiff seeks would not fundamentally alter Illinois' programs and services:

37a. Eric Radaszewski requires a hospital level of care. His needs are not comparable to those of Medicaid recipients whose medical needs are currently being met in nursing homes or to those of HSP participants whose needs can be met at a nursing home level of care.

37b. On average, only 10 persons age out of the MFTD per year. (Testimony of Barbara Ginder, Tr. p. 230, ln. 16 through p. 231, ln. 5).

37c. State officials at DHS and HFS examining the problems of participants aging out of the MFTD, which includes participants who require a hospital level of care, identified Eric Radaszewski's condition as unique even among persons who have aged out of the MFTD. (Ginder Testimony, Tr. p. 392, ln. 24 through p. 393, ln. 5).

37d. The HSP is very cost effective. (Ginder Testimony, Tr. p. 388, ln. 18 through p. 392, ln. 6). The State saves money by keeping people in the community. (Ginder Testimony, Tr. p. 388, ln. 21 through 23). With respect to 2005, HFS reported to the federal Centers for Medicare and Medicaid Services that there were 19,827 participants in the waiver, that the cost per participant for care in the community was $19,140, while the estimated cost for care in the institutional setting was $32,816 per participant, a savings of $13,676 per participant (in total, a projected costs savings of $271,154,052). (Ginder Testimony, Tr. p. 388, ln. 24 through 390, ln.

4; Def. Exh. 16, p. HFS 301250). Plaintiff's request for relief can be accommodated within this program.

37e. HFS has flexibility to modify its practices to accommodate the relief plaintiff seeks. It could develop a very narrowly tailored exception to meet Eric Radaszewski's needs. For example, without any modification in its HSP rules or waiver, HFS applied exceptional care rates, categories of enhanced rates for nursing homes, for some participants in the HSP. (Ginder Testimony, p. 225, ln. 8-16, p.226, ln. 24 through p. 227, ln. 21). The top exceptional care rate was approximately $10,000, almost twice the $4593 cost limit imposed on Eric Radaszewski. (Ginder Testimony, Tr. p. 385, ln. 9 through 21). HFS could add a similar exceptional care category to meet Eric Radaszewski's needs.

37f. Illinois law authorizes exceptional care rates up to the amount of a hospital rate. 305 ILCS 5/5-5.8a(a)("Payment for exceptional medical care shall not exceed the rate that the Illinois Department would be required to pay under the Medical Assistance Program for the same care in a hospital.").

37g. The State has flexibility to work around problems to meet the needs of persons who have medical complexity. (Ginder Testimony, p. 382, ln. 8-11). Effective January 1, 2007, the exceptional care rates that previously were applied to reimburse nursing homes to care for persons falling within the categories of exceptional care needs, were terminated when the Illinois Medicaid program converted its nursing home reimbursement rates to a new reimbursement scheme. (Ginder Testimony, Tr. p. 380, ln. 9 through p. 382, ln 11). HFS, however, continues to apply exceptional care rates to some HSP participants even though such exceptional care rates are not in fact current nursing home rates and are fictional rates. (Ginder Testimony, Tr. 381, ln.

23 through p. 382, ln 7). State officials acknowledge that apart from this lawsuit, Illinois needs to make a decision how it is going to handle the needs of medically complex persons in the HSP given that exceptional care rates no longer exist. (Ginder Testimony, Tr. p. 27, ln. 3 through 15).

37h. There is no federal requirement that every person in a waiver have a service plan that costs less than care in a nursing facility. (Ginder Testimony, Tr. p. 378, line 10 through 23). The federal government does not tell the state how to define a nursing facility level of care. (Ginder Testimony, Tr. p. 378, ln. 13 through 16).

37i. With respect to a waiver, the state can choose whether to show that the cost for each person in the waiver is less than the alternate institutional cost, or to show cost neutrality over the entire waiver population, allowing the cost of some persons to exceed the projected institutional cost. (Ginder Testimony, Tr. p. 378, ln. 22 through p. 379, ln. 11).

37j. The federal government has encouraged states to use their home and community based waiver options to try and achieve community integration under the Supreme Court's decision in *Olmstead*. (Ginder Testimony, Tr. p. 378, ln. 15 through 25, Pl. Exh. 51, pp. HFS 300991, 301003).

37k. The federal government has encouraged states to work with the federal government to overcome hurdles in rules and regulations that prevent integration in the community. (Ginder Testimony, Tr. p. 378, ln. 1 through 5, Pl. Exh. 51, p. HFS 301003).

37l. The Illinois legislature approved a pilot project and $1 million funding in state fiscal year 2007 (July 1 2006 to June 30, 2007) to address the needs and provide additional services to persons aging out of the MFTD, but to the date of trial, Illinois had not adopted any rules to provide any additional services under the pilot project. (Pl. Exh. 54, Ginder Testimony,

p. 230, ln. 6 through 15).

38. Defendant's fundamental alteration defense is based on cost projections of two expert witnesses, Todd Menenberg and Matthew Werner, who testified on behalf of defendant.

39. Todd Menenberg, is a managing director at Navigant Consulting and a certified public accountant. (Tr. p. 399, ln. 11, p. 400, ln. 13 - 14). He testified that if Eric's mother prevails and obtains the relief sought, the State would be obligated to reimburse approximately $200,000,000 or more annually above what it currently pays to participants in the HSP who would request and receive more waiver services (Tr. p. 421, ln. 1 - 19) and $32,000,000 to $33,000,000 more for persons residing in nursing facilities who would return home if there were no controls on their home services. (Tr. p. 458, ln. 6 through 8, ln. 24 through 25).

40. The Court finds that the methodologies that Mr. Menenberg used in projecting the cost to the State if Eric were to prevail in this case are not reliable and do not assist the Court in determining the existence of a fundamental alteration.

40a. With respect to persons participating in the HSP, Mr. Menenberg's opinion consists solely of calculations without any supporting rationale relating his methodology to persons similar to Eric Radaszewski. (Tr. p. 426, ln. 9 through 20). He calculates that the reimbursement rate Eric is requesting - 16 hours a day of skilled nursing - is 250 percent of the $4,593 monthly cost cap approved for Eric in 2000. His calculation is based on the unsubstantiated premise that if Eric is permitted to exceed the cost cap imposed for his care plan, then all 26,000 participants in the HSP would somehow be entitled to get services up to their service cost maximum, or 10%, 20%, or 250% of their service cost maximums. (Menenberg Testimony, Tr. p. 421, ln. 1 through 19, p. 426, ln. 15 through 20, p. 430, ln. 3 through 18). Mr. Menenberg's methodology

does not attempt to identify any persons in the HSP who need the amount of services that Eric needs. (Tr. p. 465, ln. 19 through 24). Rather, Mr. Menenberg's methodology of is to take the number of HSP recipients and calculate the benefits they are receiving now and the maximum benefits they could receive, whether or not the HSP participants need additional care or services. (Tr. p. 449, ln. 11 through 16). Mr. Menenberg provides no explanation as to why utilization review would be eliminated other than to reference discussions with "the state" and his experience that if you offer people services at no cost to them, they will avail themselves of such services. (Tr. p.422, ln. 23 - p. 423, ln. 2). Although Mr. Menenberg concedes that plaintiff is seeking intensive nursing services that are medically necessary for Eric (Tr. p. 465, ln. 6 through 7, p. 439, ln. 9) and that the "overwhelming majority" of HSP participants would not require Eric's intensive nursing care, he nonetheless concludes that HSP participants would request and receive other waiver services such as home health care, respite, vacuuming, cleaning and preparing meals. (Tr. p. 439, ln. 3 through 14, p. 441, ln. 6 through 8).

40b. Plaintiff's rebuttal expert, Samuel Flint, Ph.D., assistant professor of public policy at Indiana University Northwest, and a medicaid and health policy expert, testified that medical necessity is the basis for private and public health insurance such as Medicaid. (Tr. p. 604, ln. 9-11, p. 605, ln. 7-10, p. 646, ln. 19 through p. 647, ln. 3). Dr. Flint explained that Mr. Menenberg's data showed that 97 percent of HSP participants had service care plans that cost less than their service cost maximums, and that under the existing HSP, if they needed more services they could ask for them. (Tr. p. 645, ln. 21 through 25). In response to a question from the Court, Dr. Flint testified that if current HSP recipients were to request additional services, their requests would be subject to the presently existing utilization review process. (Tr. p. 646,

ln. 11 through 16).

40c. Because Eric is requesting medical services that he needs, his circumstances are different from those persons in Mr. Menenberg's calculations who do not medically need the hypothetical waiver services that Mr. Menenberg assumes they would request. Mr. Menenberg concedes that he has no reason to believe that persons participating in the HSP have service plans that are insufficient to allow them to remain safely in the community. (Tr. p. 505, ln.. 11 through 15). Eric is unlike other waiver recipients. Matthew Werner testified that children participating in the MFTD waiver were at the high end of medical need. (Tr. p. 587, ln. 4) and that Eric was at the high end of medical need of the participants in the MFTD Waiver. (Tr. p. 587, ln. 20 - 588, ln. 11). Barbara Ginder, the Chief of HFS's Bureau of Interagency Coordination, testified. that at a meeting attended by staff from HFS and DHS Bureau of Home Services that Eric Radaszewski was identified as a person unique and different from other persons that had medically fragile and technology dependent needs. (Tr. p. 392, ln. - p. 393, ln. 5).

40d. With respect to his projection that if plaintiff prevails, the State will also incur $32,000,000 to $33,000,000 in additional cost for persons who are currently in nursing homes and who may want to return to the community, Mr. Menenberg does not identify persons in nursing homes whose needs are not being met at the nursing home level of care they currently receive. (Tr. p. 515, ln. 9 through 22). Mr. Menenberg conceded that he did not think that any of the affected current nursing home population he identified in his opinion need as much nursing care as Eric needs. (Tr. P. 465, ln. 19 through 14). His analysis does not attempt to compare or relate the needs of persons already receiving care in nursing homes with Eric Radaszewski's need

for care.

40e. Mr. Menenberg's analysis with respect to the nursing home population, by his own testimony, does not meet statistical standards. (Tr. p. 459, ln. 19 through 20). Dr. Flint testified that the standard approach used by businesses and insurers to determine anticipated expenses is actuarial methodology that takes into account the number of people who are covered for any particular services, the services that are covered, the limitations on those services, the anticipated utilization of those services, and the cost of administration. He testified that HFS used actuaries on a regular basis for purposes of negotiating such items as HMO rates. (Tr. p. 621, ln 21 through p. 622, ln.14). Mr. Menenberg did not use an actuarial analysis. (Tr. p. 621, ln.. 7 through 11). Instead he employed methods that do not provide the Court with reliable cost projections to determine the existence of a fundamental alteration.

40f. Mr. Menenberg's testimony regarding his methodology was unclear. He testified that he used the responses to three questions on the Minimum Data Set (MDS), a questionnaire that all nursing facilities complete quarterly for each resident. (Tr. p. 460, ln. 4 through 10). Those questions were (1) whether the resident indicated a preference to return to the community; (2) whether the resident had a support person positive towards discharge; and (3) whether the resident's stay at the facility was projected to be greater than 90 days. (Tr. p. 460, ln. 11 through 20). He first testified that 216 of approximately 9000 nursing facility residents answered the three questions in a manner that would result in their inclusion in his cost projections. (Tr. p. 461, ln. 4). Subsequently, he testified that 1100 of the 9000 residents answered these questions in a manner which would result in their inclusion. (Tr. p. 461, ln.. 8 through 9, p. 461, ln. 24 through p. 462, ln. 2). In response to the Court's question of how many people answered this

form, Mr. Menenberg responded, "1100." (Tr. p. 463, ln. 19 through 20).

40g. Dr. Flint testified that Mr. Menenberg did not find 1100 persons who answered the three questions that would result in inclusion. Rather, less than 216 persons had answered the questions in the sought for manner. Mr. Menenberg arrived at the 1100 person number by undertaking an extrapolation and assuming that all 1100 persons would have answered the three questions in the same manner. (Tr. p. 632, ln. 24 through p. 633, ln. 3). Mr. Menenberg's 216 figure was high because the MDS's of 193 of the 216 identified by Mr. Menenberg, indicated a discharge date of "uncertain" in response to the third question. (Tr. p. 632, ln.10 through16).

40h. The methodology employed by Mr. Menenberg with respect to nursing facility residents was non-random judgmental sampling used by accountants and CPA's to analyze historical data when there is incomplete information. (Tr. p. 634, ln. 8 through 17). Dr. Flint testified that it is explicit in the literature that it is impermissible to extrapolate from a judgmental sample because it is a non-random sample. (Tr. p. 634, ln. 17 through 20, p. 635, ln. 24 through 636, ln. 12).

40i. Additionally, Mr. Menenberg's chosen methodology with respect to the nursing home population violated statistical principles that ensure reliability in the following respects.

40(i)(1). The methodology looked at the MDS's of all of the approximately 9000 nursing facility residents under age 60. It was therefore a census, not a sample. (Flint Testimony, Tr. p. 627, ln. 2 through 5). While principles of statistics permit extrapolation from a random sample, they do not permit taking a portion of a census called a subset and extrapolating from that number to a larger population. (Tr. p. 627, ln. 9 through12). The rationale is that everyone was asked the three questions and one cannot supply missing data and assume that the persons who

did not supply the information are similar to the persons who did and would answer the same. (Tr. p. 627, ln. 14 through p. 628, ln. 18).

40(i)(2). Mr. Menenberg's methodology estimated costs by sampling 28 of the 216 cases to arrive at an estimate for the entire census of the approximately 9000 persons. (Tr. p. 633, ln. 20 through 24). Dr. Flint testified that three of the 28 (almost 10 percent) of the persons sampled were being reimbursed by an exceptional care rate while in the entire nursing facility population of 47,000 only 540 or roughly one percent had an exceptional care rate. (Tr. p. 636, ln. 19 - 25). Nursing facilities received exceptional care reimbursement rates at a higher level for residents who had exceptional or extraordinary medical conditions that required increased care and a higher rate of reimbursement. (Ginder Testimony, Tr. p. 347, ln. 1 through 14). The costs derived by the sample were therefore biased upwards.

40(i)(3). The methodology used a stratified sample based upon activities of daily living with 21 different strata ranging from the less sick to the most sick. (Tr. p. 467, ln. 11 - 18). Dr. Flint pointed out that eight of the 28 persons sampled were in one strata and of the 20 remaining strata, one had zero persons sampled and the remaining 19 had one person sampled. (Tr. p. 639, ln. 6 through 11). He testified that one cannot extrapolate from one case and that cell sizes of five or less are suspect. (Tr. p. 639, ln. 11 through 20). In response to the Court's question of the proper size of a representative sample of 9000 persons, Dr. Flint testified that two percent or about 180 persons would be appropriate. (Tr. p. 640, ln. 1 through 4).

40(i)(4) In response to questions by the Court, Mr. Menenberg testified that the 28 persons were chosen by HFS staff and he did not know who chose them. He did not participate in the determination of which 28 persons to review. (Tr. p. 468, ln. 23 through 469, ln. 10).

40(i)(5) An HFS nurse, Roberta Sue Coonrod, using solely the MDS's of the 28 persons sampled, assessed the medical needs of each of the individuals and wrote 28 service plans. (Coonrod Testimony, Tr. p. 534, ln. 13 through 16). Dr. Flint testified to the unreliability of this method. He explained that a conventional method for undertaking such assessment would involve two people who would work independently and then review their assessments for consistency. (Tr. p. 640, ln. 19 through 641, ln. 4). He also noted, and Mr. Menenberg conceded, that Ms. Coonrod's service plans did not take into account available care at home from family which would have reduced care needs included in the 28 service plans. (Flint Tr. p. 641, ln. 5 through 14, Menenberg Tr. p. 475, ln. 20 through p. 476, ln. 9). Ms. Coonrod testified that her assessments did not take into account care available at home (Tr. p. 547, lns. 15 through 16), that she did not have information on the specific medications that the 28 individuals would take (Tr. p. 548, ln. 13 through 14), and that normally in assessing nursing home residents she would not rely solely on the MDS, but would observe the residents and interview them. (Tr. p. 549, ln. 7).

40(i)(6). Mr. Menenberg's methodology for determining the cost of persons residing in nursing facilities is based on the service plans that Ms. Coonrod prepared. His methodology for determining cost of persons in the HSP was based on his view that service plans would not mean anything if Eric were to prevail and would be essentially eliminated. His methodologies are inconsistent and contradictory.

41. Matthew Werner, the former advisor to defendant on healthcare finance and former chief of HFS's Bureau of Rate Development and Analysis (Tr. p. 555. lns. 8 - 16, p. 556, lns. 17-18), testified that if Eric were to receive 24 hours of skilled nursing in his home, the potential additional cost to the State for persons residing in nursing facilities returning home and receiving

24 hours of skilled nursing and persons participating in the HSP receiving the same reimbursement as Eric could be 2.2 to 2.3 billion dollars annually (Tr. p. 560, ln 25 through p. 561, ln. 4, p. 575, ln.22 through25).

42. The Court finds that the methodology that Mr. Werner used in projecting the cost to the State if Eric were to prevail in this case is not reliable and does not assist the Court in determining the existence of a fundamental alteration.

42a. Mr. Werner's methodology makes no attempt to project the number of persons who would leave nursing facilities or the actual amount of cost of services to the State. Rather his model estimated the potential maximum impact if Eric were to receive 24 hours of nursing care and persons residing in nursing facilities received 24 hours of nursing care at home and persons in the HSP received 24 hours of nursing services instead of their present service plans. (Tr. p. 561, ln. 7 through12, Defendant's Exhibit 3, p. HFS009599). He provided potential maximum impact cost figures of the additional cost to the State if 1, 10, 20 or 30 percent of these two groups received Eric's level of care (Defendant's Exhibit 3, p. HFS009601) and set forth his projections on page two of his Report at a 10 percent shift level. (Defendant's Exhibit 3, p. 009599). He testified that he was not predicting any shift. (Tr. p. 589, ln.. 6 through 9). He testified that he was not analyzing or predicting actual cost. (Tr. p. 590, ln. 5 through 7, p. 585, ln. 13 through 16). He provides calculations but no opinion as to any impact on the State's program if plaintiff prevails.

42b. Mr. Werner did not use standard actuarial processes which would have statistically determined the estimate of expected cost based on expected utilization, not the maximum dollar exposure. (Flint Testimony, Tr. p. 656, ln. 19 through 22). Mr. Werner projected results that

varied significantly from Mr. Menenberg's estimate of $32-33 million. Mr. Werner projected a cost impact of 1.2 billion dollars for persons who might leave nursing facilities while Mr. Menenberg projected 33 million for that same group. (Tr. p. 654, ln. 15 through 25).

42c. Mr. Werner testified that he did not know how many persons would qualify to receive Eric's level of services. (Tr. p. 570, ln. 23 through p. 571, ln. 1).

42d. Mr. Werner testified that he did not know if anyone would shift from nursing facilities, only that it is likely that people would shift. (Tr. p. 571, ln. 3 through 4). He testified that he did not know how many people would shift. (Tr. p. 572, ln. 7 through 9).

42e. Mr. Werner testified that he had no reason to believe that persons in nursing facilities did not have their medical needs or care needs met at their facilities or that persons in the HSP did not have their need for care met under their existing service plans. (Tr. p. 583, ln. 23 through p. 584, ln. 10).

42f. Mr. Werner's analysis did not look at the medical conditions of the persons in these two groups or the severity of their medical needs. (Tr. p. 584, ln. 11 through 19).

42g. Mr. Werner did not have knowledge of Eric's medical condition or needs or how those conditions compare to the needs of persons in nursing homes or the HSP. (Tr. p. 584, ln. 24 through p. 585, ln. 9).

42h. Mr. Werner's analysis ignored medical necessity. (Flint Testimony, Tr. p. 653, ln. 14 through 16) and assumed that a judgment in Eric's favor would somehow obviate medical necessity and utilization review. (Flint Testimony, Tr. p. 654, ln. 8 through 14). Neither Mr. Werner's testimony nor his report provides any rationale or explanation why medical necessity and utilization review would be eliminated.

II. Proposed Conclusions of Law

1. Title II of the Americans with Disabilities Act 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 the services, programs or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. §12132.

2. A "qualified individual with a disability" means "an individual with a disability who, with or without reasonable modifications to rules, policies or practices, ... or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by the public entity." 42 U.S.C. 12131(2).

3. Eric Radaszewski is a qualified individual with a disability within the meaning of Title II of the Americans with Disabilities Act (ADA). 42 U.S.C. §12132.

4. HFS is a public entity within the meaning of Title II of the ADA. 42 U.S.C. § 12131(1)(a)(A),(B).

5. Under federal regulations implementing the ADA, public entities must administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities. 28 C.F.R.§35.130(d).

6. The "most integrated setting appropriate" is defined as "a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible. 28 C.F.R. pt. 35, App. A, p. 450.

7. Public entities must make such modifications as are reasonable to avoid unduly segregating persons with disabilities, but need not make such modification if it can show "that making the modification would fundamentally alter the nature of the service, program, or

activity." 28 C.F.R. §35.130(b)(7).

8. The Rehabilitation Act applies to programs which receive federal assistance. 29 U.S.C. §794a. The Rehabilitation Act also prohibits discrimination against persons with disabilities. Id.

9. Regulations implementing the Rehabilitation Act also require that recipients of federal funds administer their programs and activities "in the most integrated setting appropriate to the needs of qualified handicapped persons." 28 C.F.R. §41.51(d).

10. Under regulations implementing the Rehabilitation Act, recipients of federal funds must make such modifications as are reasonable to avoid segregating persons with disabilities, but need not make such modification if it can show that to do so would be an undue hardship. 28 C.F.R. §41.53.

11. The relevant provisions of the ADA and the Rehabilitation Act and their implementing regulations are construed in the same manner. *Radaszewski v. Maram*, 383 F.3d 599, 607 (7th Cir. 2004).

12. Plaintiff is entitled to relief on her claim under the ADA and the Rehabilitation Act because: (1) the state's treatment professionals have found that community-based treatment is appropriate for her son Eric Radaszewski; (2) Eric, through his guardians, does not oppose community treatment; and (3) Eric's placement in the community with the nursing care plan he requires can be reasonably accommodated taking into account the State's resources and the needs of others with similar disabilities. *Olmstead v. L.C. ex real. Zimring*, 527 U.S. 581 (1999) and *Radaszewski v. Maram*, 383 F.3d 599, 608 (7th Cir. 2004).

13. Under the criteria set out in *Radaszewski v. Maram*, 383 F.3d 599 (7th Cir. 2004),

Eric's request for relief may be accommodated in that (1) a nursing facility would not meet Eric's medical needs; (2) Eric requires a hospital level of care; (3) the care he would receive in a hospital is the equivalent of the home nursing care he receives, and (4) Eric is a "qualified individual" under the Americans with Disabilities Act in that he meets the essential eligibility requirements of HFS's waiver program known as the Home Services Program (HSP) because he has long term disabilities, he is eligible for Medicaid, he is at risk of placement in an institution; his home is an appropriate care setting, and the cost of his care at home does not exceed the cost of care at the hospital level of care he requires.

14. Defendant has not shown that the relief plaintiff seeks would fundamentally alter the State's programs or services.

Respectfully submitted,

s/Sarah Megan
Sarah Megan #6182931
Attorney for Plaintiff
Prairie State Legal Services, Inc.
201 Houston St., Suite 200
Batavia, IL 60510
(630) 232-9420

Certificate of Service

I hereby certify that on October 17, 2007, I presented the foregoing Plaintiff's Proposed Findings of Fact and Conclusions of Law with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Karen Elaine Konieczny
Karen.Konieczny@Illinois.gov

John E. Huston
John.Huston@Illinois.gov

Christopher Samuel Gange
Christopher.Gange@Illinois.gov

Respectfully submitted,

s/Sarah Megan
Sarah Megan Bar Number 6182931
Attorney for Plaintiff
201 Houston St., Suite 200
Batavia, IL 60510
Telephone: (630) 232-9420
Fax: (630) 232-9402
E-mail: smegan@pslegal.org