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

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| DONNA RADASZEWSKI, Guardian, on Behalf of Eric Radaszewski, | ) | |
| Plaintiff, | ) | |
| v. | ) | No. 01 C 9551 |
| | ) | Judge John W. Darrah |
| BARRY S. MARAM, Director of the Illinois Department of Healthcare and Family Services, | ) | Magistrate Judge Schenkier |
| Defendant. | ) | |

**DEFENDANT'S CLOSING ARGUMENT**

NOW COMES Defendant, BARRY S. MARAM, in his official capacity as Director of the Illinois Department of Healthcare and Family Services, by and through his attorney, LISA MADIGAN, Attorney General of Illinois, and hereby submits his Closing Argument, stating as follows:

## I. THERE IS NO INDEPENDENT CLAIM FOR "INTEGRATION" UNDER TITLE II OF THE ADA, OR SECTION 504 OF THE REHABILITATION ACT OR ANY FEDERAL REGULATIONS.

### A. Neither Title II Of The ADA Nor Section 504 Of The Rehabilitation Act Mandates "Integration."

Plaintiff's claims in this Court are set forth at Paragraphs 42 and 45 of Count VI and Paragraphs 42 and 43 of Count VII. Plaintiff claims that both Title II of the ADA and 28 C.F.R. § 35.130 and Section 504 of the Rehabilitation Act and 28 C.F.R. § 41.51(d) require public entities like the Illinois Department of Healthcare and Family Services to "provide services to persons with disabilities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." (Complaint at Count VI, ¶ 42; Count VII at ¶ 43). Plaintiff, thus, does not claim that Defendant intentionally discriminated against Eric, that Eric received disparate treatment at Defendant's hands or that Defendant failed to grant Eric a reasonable accommodation. In the Seventh Circuit, these are the three theories of liability that the ADA

recognizes. *Wisconsin Community Services v. City of Milwaukee*, 465 F.3d 737, 753 (7th Cir. 2006).

No reading of the plain language of either Title II of the ADA or Section 504 supports a conclusion that either statute mandates public entities to provide services in the most integrated setting appropriate to the needs of the disabled. Title II of the ADA states only 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. The ADA is an anti-discrimination statute that prohibits discrimination against the disabled and does not require the imposition of a particular standard of care. *Olmstead v. L.C.*, 527 U.S. 581, 623 (1999) (Thomas, J., dissenting).

Like the ADA, the Rehabilitation Act is an anti-discrimination statute. Moreover, in *Southeastern Community College v. Davis*, 442 U.S. 397, 410-12 (1979), the Supreme Court expressly found that the Rehabilitation Act does not impose an affirmative obligation on recipients of federal funds. Additionally, the Rehabilitation Act is legislation enacted pursuant to Congress' Spending Power. *Stanley v. Litscher*, 213 F.3d 340, 344 (7th Cir. 2000). Legislation enacted under the Spending Power must unambiguously impose a condition on any grant of federal money. *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17-18 (1981). The Rehabilitation Act does not create an affirmative, specific right to require Defendant to fund in-home care that any physician prescribes for participants in home and community-based programs, generally, and Defendant need not fund in-home care, particularly, when the authority to operate the home and community-based programs is located in another ambiguous piece of Spending Power legislation, *i.e.*, 42 U.S.C. § 1396n(c).

**B. The Integration Regulations, 28 C.F.R. §§ 35.130 And 41.51(d), Do Not Impose Any Affirmative Obligations On The Public Entity.**

The integration regulations do not impose any affirmative obligations on the public entity independent of the ADA and Section 504. Regulations creating rights independent of any federal statute are not enforceable laws. *Mungiovi v. Chicago Housing Authority*, 98 F.3d 982, 983-84 (7th Cir. 1996). In *Alexander v. Sandoval*, 532 U.S. 275, 285-89 (2001), the Supreme Court held that federal agencies were authorized to "effectuate" Title VI by issuing regulations, but that they could only effectuate rights already created by statute and could not themselves create new rights or rights of action. Under these authorities, since the integration regulations

appear to create new rights and new causes of action that the ADA and Rehabilitation Act themselves do not recognize, they are not enforceable and do not authorize the relief Plaintiff seeks here.

**C. None Of The Authorities Plaintiff Cited Recognizes An Independent Claim For "Integration."**

First, Plaintiff cited no case law that recognizes an independent claim for "integration." *Olmstead v. L.C.*, 527 U.S. 581 (1999) did not recognize and give imprimatur to such a claim. *Olmstead* did not find either a private right of action to enforce the integration regulations, or hold that an integration mandate exists within the language of the ADA or Section 504. The *Olmstead* Court stated, first, that it was not determining the validity of various regulations promulgated under the ADA and, further, that the regulations were entitled only to "respect" and not *Chevron* deference. *Olmstead*, 527 U.S. at 592, 597-98. *Olmstead*, rather, turned on the State of Georgia's failure to grant a reasonable modification in the form of community placements for people who were appropriate for existing and unfilled Medicaid-funded community-based programs, and found support for the decision in the fact that the State of Georgia had home and community-based Medicaid programs that responsible Georgia officials believed were appropriate for the *Olmstead* plaintiffs. *Olmstead*, 527 U.S. at 593-95, 601-03. The ADA and Section 504 violations identified in *Olmstead* concerned the State of Georgia's failure to grant a reasonable modification in the form of placement into existing home and community-based programs. *Accord: Wisconsin Community Services v. City of Milwaukee*, 465 F.3d 737, 753 n.13 (7th Cir. 2006).

*Olmstead* is, thus, factually distinguishable from the circumstances here. Eric Radaszewski is not residing in a large State institution and asking for community services; Eric is already residing in the community. Defendant's Proposed Findings of Fact at 113-18, 123. *Olmstead*, 527 U.S. at 593-94; *Sanchez v. Johnson*, 416 F.3d 1051, 1063 (9th Cir. 2005). The State of Georgia was not ordered to modify its Medicaid waiver in order to accept the *Olmstead* plaintiffs into the community-based programs. Rather, the reasonable modification in *Olmstead* consisted of placing persons into *existing* home and community-based programs that were admittedly appropriate for them. Defendant, here, has a home and community-based program that serves as an alternative to placement in a nursing home. Defendant's Proposed Findings of

Fact at 60-112. Eric's physician and guardian do not want to participate in the Defendant's Home Services Program. Defendant's Proposed Findings of Fact at 113-145.

Second, the decision in *Radaszewski ex rel. Radaszewski v. Maram*, 383 F.3d 599 (7th Cir. 2004) does not aid Plaintiff because it is not a decision on the merits. In *Radaszewski*, the Court simply reversed a dismissal of Plaintiff's ADA claims on Eleventh Amendment grounds, reversed a judgment on the pleadings for Defendant on Plaintiff's Section 504 claim and remanded the case for development of a record. This Court is not bound by any portion of the *Radaszewski* decision that touches on issues that were not formally before the Seventh Circuit. *Gertz v. Welch*, 680 F.2d 527, 532-33 (7th Cir. 1982). The reviewing court's mandate controls as to matters within its compass, but, on remand, the lower court is free as to other issues. *Gertz*, *Id*.

Finally, the Plaintiff reads far too much into the Seventh Circuit's *Radaszewski* decision. Plaintiff cannot seriously suggest that the Seventh Circuit either 1) decided the merits of Plaintiff's claims without evidence, 2) fashioned an approach to the discrimination laws that departed from Supreme Court and Seventh Circuit precedent, or 3) held that Eric had an independent right to "integration" either through the ADA and Section 504 or the regulations. Since Plaintiff's claims are only for "integration," and there is no right to integration either in the statutes or independently enforceable through the regulations, Defendant is entitled to judgment on Counts VI and VII of Plaintiff's Complaint without more.

## II. REGARDLESS OF HOW PLAINTIFF'S CLAIMS ARE CAST, PLAINTIFF FAILS TO MEET HER BURDEN OF PROOF AND DEFENDANT IS ENTITLED TO JUDGMENT IN HIS FAVOR AS TO ALL CLAIMS AND DEFENSES.

### A. Eric Radaszewski Was Not Excluded From The Home Services Program By Reason Of His Disability Within The ADA And Section 504.

The ADA, at 42 U.S.C. § 12132, provides in pertinent part that " … no qualified individual with a disability shall, *by reason of such disability*, be denied the benefits of the … programs … of a public entity." (Emphasis supplied). The Rehabilitation Act, at 29 U.S.C. § 794(a), provides in pertinent part that no otherwise qualified individual with a disability shall "be excluded from the participation in … any program or activity *solely by reason of his disability*." (Emphasis supplied). Cases interpreting these statutes hold that when, as here, a State adopts a neutral rule that incidentally disqualifies a disabled individual, then the neutral application of that

rule cannot be said to be a decision actuated "solely on the basis of disability." *Southeastern Community College v. Davis*, 442 U.S. 397, 412-13 (1979); *Wimberly v. Labor and Industrial Relations Commission of Missouri*, 479 U.S. 511, 516-17 (1987); *Sandison v. Michigan High School Athletic Ass'n., Inc.*, 64 F.3d 1026, 1030-34, 1036 (6th Cir. 1995). The phrase "by reason of" requires a showing of proximate causation that is lacking in this case. *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 268 (1992).

Eric Radaszewski is not currently eligible for the only program under which he could obtain home and community-based services from Defendant, *i.e.*, the Home Services Program (hereinafter "Home Services Program" or "HSP"). Defendant's Proposed Findings of Fact at 92-145. With regard to Eric's status, those Proposed Findings of Fact show that: 1) there has been no DON evaluation of Eric since October 10, 1999; 2) there is no current Service Cost Maximum or exceptional care rate that authorizes an amount of services that Eric's guardian could purchase for him on a monthly basis through HSP; 3) there is no current Home Services Program Service Plan for Eric within a Service Cost Maximum or exceptional care rate; 4) no one made any recent determination that HSP services for Eric Radaszewski were appropriate; 5) Eric's guardian has not recently agreed to and signed an HSP Service Plan; and 6) no physician reviewed and approved a current HSP Service Plan. Defendant's Proposed Findings of Fact at 110, 113-145. These elements are "essential eligibility requirements" of HSP that cannot be waived or disregarded. *See Sandison*, 64 F.3d at 1034-35, 1036-37.

Under *Davis*, *Wimberly* and *Sandison*, Eric Radaszewski's lack of current eligibility eligibility status in HSP was not "by reason of his disability" within the ADA and Rehabilitation Act. First, it is evident that no act on the part of Defendant Maram resulted in Eric Radaszewski being denied the benefits of the Home Services Program. Second, Eric had a case in the Home Services Program and received services for one month. Eric's mother and physician do not want Eric to participate in HSP. Defendant's Proposed Findings of Fact at 113-145. Third, HSP's limitation of benefits to a nursing home level of care is driven by the Persons with Physical Disabilities Medicaid Waiver and operates neutrally on all disabled persons. There is no evidence that any illness or circumstance uniquely associated with Eric Radaszewski was the proximate cause of his ineligibility for HSP. Finally, it is entirely speculative whether Eric could now meet the requirements of the Home Services Program. According to the testimony of Eric's physician, Dr. Peters, the physician would not approve Eric for the HSP under the existing

program requirements. Defendant's Proposed Findings of Fact at 130-35, 110-12. Without an HSP Service Plan within the HSP rules and without the requisite certification from a physician that the services that could be provided under the allowable rate can be appropriately given to Eric in his home, this Court is left to guess whether Eric qualifies for HSP within the meaning of Section 12131(2). This Court cannot substitute its judgment for that of Eric's physician and make the determination that Eric could now be cared for under the HSP Service Plan developed for him in the summer of 2000. *Jones v. Lincoln Electric Co.,* 188 F.3d 709, 723-25 (7th Cir. 1999). Since Eric's ineligibility for HSP is not "by reason of his disability," Defendant is entitled to judgment on Counts VI and VII of Plaintiff's Complaint.

**B. Eric Radaszewski Is Not An "Otherwise Qualified Individual" With A Disability.**

The ADA, at Section 12132, provides in pertinent part 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." To establish a violation of Title II of the ADA, the Plaintiff must show that 1) he is a qualified individual with a disability, 2) he was excluded from participation in or otherwise discriminated against with regard to a public entity's services, programs, or activities, and 3) such an exclusion was by reason of his disability. *Sandison v. Michigan High School Athletic Ass'n., Inc*., 64 F.3d 1026, 1036 (6th Cir. 1995).

Turning, next, to Section 504, it provides in pertinent part that, "... [n]o otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ... " 29 U.S.C. § 794(a). To establish a violation of Section 504, the Plaintiff must show that 1) he is handicapped within the meaning of Section 504, 2) he is otherwise qualified for the benefit or services sought, 3) he was denied the benefit solely by reason of his handicap, and 4) the program providing the benefit or services received federal financial assistance. *Sandison*, 64 F.3d at 1030-31.

In *Alexander v. Choate*, 469 U.S. 287, 301-09 (1985), the Supreme Court held that meaningful access to Medicaid services for the disabled did not restrict the State's discretion under federal Medicaid law to choose the proper amount, scope and duration limitations on covered services. The Court observed that Section 504 does not require the State to alter the

benefits offered under its Medicaid program simply to meet the reality that disabled persons have greater medical needs because, to conclude otherwise, would be to find that the Rehabilitation Act requires that States view certain medical conditions as more important than others and more worthy of cure through government subsidization. *Alexander*, 469 U.S. at 302-04. The Court went on to find that Tennessee's limitation on hospital days covered by Medicaid does not offend Section 504 because the denial of benefits, even when left unmodified, was not linked in any way to those plaintiffs' particular disabilities. *Id*.; a*ccord*: *Frances J. by Murphy v. Bradley*, 1992 WL 390875 * 7 (N.D. Ill. 1992) *vacated on other grounds* 19 F.3d 337 (7th Cir. 1994) (elderly disabled who claimed that they did not receive enough in benefits under certain home and community-based Medicaid waiver program because of the program caps linked to the assessment tool the State used to grant those benefits failed to state a claim under Section 504; plaintiffs were not deprived of meaningful access to the benefits because the Medicaid Act gives the states substantial discretion in defining the allocation of benefits).

Defendant adopts all the arguments, authorities and facts set forth in Argument II(A) as his facts and arguments here. Eric is not currently eligible for the Home Services Program and, furthermore, does not want to participate in the Home Services Program. Defendant's Proposed Findings of Fact at 92-145. Plaintiff does not meet her burden of proof that Eric is either a "qualified individual with a disability" or "otherwise qualified" within the statutes. Accordingly, Defendant is entitled to judgment on Counts VI and VII of Plaintiff's Complaint.

### C. The Modifications That Eric And His Guardian Seek To The Medicaid Program Are Not Reasonable And Constitute Fundamental Alterations To Defendant's Programs.

In *Alexander v. Choate*, 469 U.S. 287 (1985) the Supreme Court found a duty to accommodate in Section 504 generally when it explained that "under some circumstances, a 'refusal to modify an existing program might become unreasonable and discriminatory.'" *Alexander*, 469 U.S. at 300, *citing Southeastern Community College v. Davis*, 442 U.S. 397, 413 (1979). *See also Wisconsin Community Services, Inc. v. City of Milwaukee*, 465 F.3d 737 746-48 (7th Cir. 2006); *Washington v. Indiana High School Athletic Ass'n., Inc*., 181 F.3d 840, 850-52 (7th Cir. 1999). As a corollary, the Supreme Court found that the *Alexander* plaintiffs' request to modify the Tennessee's Medicaid program by removing the cap on the duration of hospital days covered "would be far from minimal" and well beyond the accommodations that were required

under *Davis*. *Alexander*, 469 U.S. at 308. The Court also noted that similar treatment would have to be accorded other groups. *Id*. The Supreme Court, thus, recognized that the equities permitted the State to resist the broad-based distributive decision that would be required. *Id*.

Under *Olmstead v. L.C*., 527 U.S. 581 (1999), officials of the State of Georgia were found to have violated Title II of the ADA by failing to grant a reasonable modification to the State's Medicaid program in the form of placing institutionalized persons into existing and unfilled community-based services programs. *Olmstead*, 527 U.S. at 601-03. The *Olmstead* Court did not rule on whether a State would, under the ADA and Section 504, have to expand an existing Medicaid Waiver or secure a new one to accommodate certain disabilities. Nevertheless, the Court held that the State is permitted to resist modifications that entail fundamental alterations of the State's services and programs. *Id*. 527 U.S. at 603-07. The *Olmstead* Court specifically disapproved two methods of analyzing whether a requested modification is reasonable or whether it amounts to a "fundamental alteration" of a State's services. First, the *Olmstead* court disapproved measuring the costs of placing one or two disabled people into the community against the entirety of the State's budget for the treatment of that disability because the requested relief will always seem reasonable. *Olmstead*, 527 U.S. at 603-04. The *Olmstead* Court also disapproved of simply comparing the cost of institutionalization against the cost of community-based services, because that comparison would not account for the State's financial obligation to continue to operate partially full institutions with fixed costs. *Id*. at 604 n.15. Thus, even if a community-based placement would be less costly for a specific individual, the State must still factor into its overall budget the fixed costs of maintaining some necessary state institutions. Moreover, at least one concurring opinion in *Olmstead* refused to permit federal courts to review the policy decisions that responsible state officials made in creating their programs, finding that "grave constitutional concerns" arise when federal courts inquire into states' decisions about establishing or declining to establish new programs. *Olmstead*, 527 U.S. at 612-13 (Kennedy, J., concurring).

Under the law of the Seventh Circuit, the public entity's failure to grant a reasonable accommodation is a theory of liability separate from intentional discrimination. *Good Shepherd Manor Foundation, Inc. v. City of Momence*, 323 F.3d 557, 561-62 (7th Cir. 2003); *Wisconsin Community Services*, 465 F.3d at 753. In this Circuit, a plaintiff pursuing a reasonable accommodation claim under Title II need not allege either disparate treatment or disparate

impact. *Id*. Under *Wisconsin Community Services*, an accommodation under Title II of the ADA is only required when it is necessary to avoid discrimination on the basis of disability and reasonable. *Id*. at 751. In resolving the issues of necessity and reasonableness, the Seventh Circuit approved the approach the Supreme Court fashioned in *Alexander v. Choate. Wisconsin Community Services,* 465 F.3d at 746-48, 751-53.

Lastly, the Ninth Circuit, in *Sanchez v. Johnson*, 416 F.3d 1051, 1063-68 (9th Cir. 2005) found that an injunction ordering California welfare officials to increase Medicaid-funded community placements for persons with disabilities by financing whatever supports were necessary to enable them to live in the community would result in a fundamental alteration of California's *Olmstead* plan. The *Sanchez* Court cited *Olmstead* with approval for the proposition that plaintiffs seeking relief under the ADA and Section 504 cannot prevail by putting on proof of simplistic and facile comparisons of the costs of care in the community versus the costs of care in an institution. *Sanchez*, 416 F.3d at 1067 n.10.

The relief Plaintiff seeks for Eric would undo the concepts on which Illinois secured approval for the Persons with Physical Disabilities Medicaid Waiver; namely to prevent admission of disabled persons to nursing facilities by allotting them such sums to choose their own services in the community as would have been expended on them were they to enter a nursing home. Plaintiff's request is not necessary to prevent discrimination on the basis of Eric's disability. Concerning necessity, the fact that a program requirement affects the disabled, without more, does not prove discrimination on the basis of disability. *Alexander*, 469 U.S. at 303-04; *Wisconsin Community* Services, 465 F.3d at 751-53. Plaintiff's request is also not reasonable under these same authorities because an order to compel Defendant to expand the Persons with Physical Disabilities Medicaid Waiver, either by adding services, by requiring the selection of a new level of care yardstick, or by raising cost caps, would constitute a fundamental alteration. Indeed, the word "modification" "connotes moderate change." *Sandison*, 64 F.3d at 1037.

**1. Granting Plaintiff The Relief She Seeks For Eric Would Result In A Violation Of The Cost-Neutrality Requirements Of the Persons With Physical Disabilities Medicaid Waiver.**

The Defendant's authority to furnish home and community-based services to physically disabled persons through HSP derives from the Persons with Physical Disabilities Medicaid

Waiver. Defendant's Proposed Findings of Fact at 93. The terms of the Persons with Physical Disabilities Medicaid Waiver control the requirements of HSP. Defendant's Proposed Findings of Fact at 94. An injunction to give Eric an HSP Service Plan that would exceed the cost caps so as to enable him to receive at least 16 hours of private-duty nursing in his home is not a reasonable modification to the Home Services Program for three reasons. First, as part of its application for the Persons with Physical Disabilities Medicaid Waiver, Illinois expressly represented to the federal government that it was seeking to provide home and community-based services to disabled persons under age 60 who would need a level of services in a nursing facility. Defendant's Proposed Findings of Fact at 62, 63, 66, 76-87. The federal government approved the Persons with Physical Disabilities Medicaid Waiver with that criterion. Defendant's Proposed Findings of Fact at 62. Since the exceptional care rate was an actual Medicaid rate developed for and paid to nursing facilities that care for medically challenged persons, Defendant's Proposed Findings of Fact at 103-06, Eric cannot have a Home Services Plan that exceeds the exceptional care rate without running afoul of the federally-approved Persons with Physical Disabilities Medicaid Waiver. The State's use of the nursing home cost comparison to measure the cost of HSP services is the very essence of the Persons with Physical Disabilities Medicaid Waiver.

Second, the Seventh Circuit recognized in *Bertrand ex rel. Bertrand v. Maram*, 495 F.3d 452, 458 (7th Cir. 2007) that each component of a program under the aegis of a home and community-based Medicaid Waiver is subject to a medical need requirement, but only up to the supplemental program's cap, whether it is a cap on spending, a service exclusion, or a cap on the number of persons served. Under HSP, the caps are the agreements that the State will refuse to provide services to any person when the cost of serving that person would exceed the costs that the State would expend were that individual in a nursing facility and the State's decision not to cover the costs of any service a physician may prescribe, including private duty nursing. Defendant's Proposed Findings of Fact at 52-55, 60-145.

Third, Congress' very purpose in enacting 42 U.S.C. § 1396(n) was to enable the States to provide access to services not covered under the State's Title XIX Medicaid Plan without creating entitlements that create fiscal woes. *Bertrand*, *Id.* (limiting waiver services for CILA to certain number of persons in greatest immediate need is "sensible"). Moreover, in the Persons with Physical Disabilities Medicaid Waiver, the concept of cost neutrality must be satisfied not

only on an aggregate basis, but also on an individual basis. Defendant's Proposed Findings of Fact at 76-87, 66. Neither the ADA nor Section 504 requires Defendant to expand the Persons with Physical Disabilities Waiver by funding services for Eric or anyone else at a hospital level of care. *Arc of Washington v. Braddock*, 427 F.3d 615, 619-22 (9th Cir. 2005). Defendant cannot accept any person in HSP whose needs cannot be safely satisfied by using the nursing home level of care yardstick.

**2. An Injunction To Require Defendant To Approve Any Service For A Participant In The Home Services Program That A Physician Prescribes As "Medically Necessary" Is Not A Reasonable Modification.**

The Persons with Physical Disabilities Medicaid Waiver is not what can be described as a "medical" model. Defendant's Proposed Findings of Fact at 60-91. Defendant's purpose for having secured the Persons with Physical Disabilities Medicaid Waiver was to avoid unnecessary placements of disabled persons into nursing homes by arranging to allow them to receive certain services in community-based settings. Defendant's Proposed Findings of Fact at 62-65. Defendant assured the federal government that home and community-based services were driven by "consumer choice" and not by a physician's prescription of what services are medically necessary. Defendant's Proposed Findings of Fact at 70-79, 88-89, 96-112. Under the Persons with Physical Disabilities Medicaid Waiver, Illinois is required to refuse to offer home and community-based services to any person for whom it can reasonably be expected that the cost of home or community-based services furnished to that individual would exceed a nursing facility level of care. Defendant's Proposed Findings of Fact at 66. The Persons with Disabilities Medicaid Waiver does not allow Illinois to cover, as medical assistance, the cost of home and community-based services for people who would otherwise require a hospital level of care. Defendant's Proposed Findings of Fact at 62. If a hospitalized Medicaid-eligible individual would be treated on a long-term basis in a hospital because a placement in a nursing facility cannot be found, the Illinois Medicaid program will not reimburse the hospital more than the nursing facility rate. *See* 89 Ill. Admin. Code 140.569(j).

The HSP, operating according to the terms of the Persons with Physical Disabilities Medicaid Waiver, is also not a medical model and does not authorize services in excess of the program's limits based on medical need. Defendant's Proposed Findings of Fact at 92-112. A person who wishes to receive home and community-based services must make an application to

HSP. In order to receive services through HSP, an individual must be Medicaid-eligible; must have a severe disability which is expected to last for at least 12 months or for the duration of life; must be in need of long-term care as determined by a Determination of Need ("DON") score of at least 29 points; must obtain certification from a physician that he/she is in need of long-term care and that this care can safely and adequately be provided in his/her home as provided in the HSP Service Plan developed for the individual; and cannot require in-home services that are expected to cost more than the cost the State would pay for nursing home care for an individual with a similar DON score. For each individual meeting the minimum required DON score for eligibility there is a corresponding Service Cost Maximum for his/her DON score which is the maximum amount that may be expended for services through HSP for an individual who chooses HSP services over institutionalization. The amount set in the Service Cost Maximum directly corresponds to the amount the State would expect to pay a nursing home for the nursing care component if that person chose to enter a nursing home. Defendant's Proposed Findings of Fact at 92-112.

An HSP applicant with exceptional care needs whose need for care cannot be met by the Service Cost Maximum may qualify for an exceptional care rate. Defendant's Proposed Findings of Fact at 103-05. The exceptional care rate is the rate HFS would have paid to a nursing facility under the Exceptional Care Program for a particular diagnosis category.[1] *Id.* After an exceptional care rate has been extended, Home Services Program counselors, in cooperation with the HSP applicant or guardian develop an HSP Service Plan. Defendant's Proposed Findings of Fact at 107-09. A physician's role in HSP is limited to having the applicant's personal physician review the HSP Services Plan for its appropriateness and to state that he would recommend placement in a nursing home without HSP. Defendant's Proposed Findings of Fact at 110-12.

From the foregoing, it is apparent that reading a requirement into the Home Services Program that Eric can receive whatever services his physician feels are medically necessary to maintain him in the community is not a reasonable modification. First, Plaintiff misapprehends the concept of "medical necessity" as it pertains to Medicaid. "Medical necessity" is not a tool by which to secure entitlement to services; rather, it is a means by which a State appropriately

[1] Even though the Exceptional Care Program ended January 1, 2007, Illinois still utilizes the rates established under that program and, in the appropriate case, extends an exceptional care rate to the HSP participant. Defendant's Proposed Findings of Fact at 106.

can choose to limit services. 42 C.F.R. § 440.230. Second, to read Plaintiff's "medical necessity" notions into HSP for any service that 1) exceeds the cost caps; or 2) is not already provided under the Medicaid Waiver, or 3) is desired by anyone who is Medicaid-eligible whether eligible for HSP or not, undermines the very purpose for which the State secured the Medicaid Waiver here. 42 U.S.C. § 1396n(c); Defendant's Proposed Findings of Fact at 62-79, 85-86. It is evident that HSP was not designed so that the delivery of services would be driven by what a physician prescribes as medically necessary. *Id*. From the foregoing, it is also evident that there are no mechanisms in place by which the Medicaid agency or its designee can review physicians' claims of medical necessity for HSP. Defendant's Proposed Findings of Fact at 60-112. Therefore, to read Plaintiff's concept of "medical necessity" into the HSP or Persons with Physical Disabilities Medicaid Waiver is not reasonable.

**3. If The Relief That Plaintiff Seeks Is An Extension Of Eligibility For Eric In The Medically Fragile And Technology Dependent Children's Waiver, Such A Modification Is Not Reasonable.**

The Medically Fragile and Technology Dependent Children's Waiver permits medically complex or technology dependent children under the age of twenty-one to become eligible for Medicaid without counting the income of their parents. Defendant's Proposed Findings of Fact at 147. The Children's Waiver offers very limited services through the Waiver itself, notably respite, home modifications and training programs for caregivers. Defendant's Proposed Findings of Fact at 150. What makes participation in the Children's Waiver attractive is the child's concomitant eligibility for Early and Periodic Screening, Detection and Treatment, or "EPSDT." 42 U.S.C. §§ 1396a(a)(43); 1396d(r). Because of EPSDT, a child under the age of 21 can receive all medically necessary services paid for by Medicaid, whether such services are covered under the State's Title XIX Medicaid Plan or not. Section 1396d(r). Eric received private duty nursing services in his parents' home through EPSDT. Defendant's Proposed Findings of Fact at 146-152.

Plaintiff really wants the services that Eric received prior to reaching the age of 21 to continue indefinitely. Plaintiff's Closing Argument at 6-9. An injunction to continue to allow Eric to participate in the Children's Waiver or to create a new program for Eric that looks like the Children's Waiver or to extend EPSDT eligibility for Eric is not a reasonable modification for the following reasons. First, the creation of a new program just for Eric is not a reasonable

modification as a matter of law. *Alexander v. Choate*, 469 U. S. 287, 303-04 (1985). Second, the remedies stated above are not reasonable because age is an essential eligibility requirement both for the Children's Waiver and the EPSDT program. *Sandison v. Michigan High School Athletic Ass'n., Inc.*, 64 F.3d 1026, 1034-35, 1036-37 (6th Cir. 1995). Finally, the Children's Waiver has higher programmatic and administrative costs associated with it. Defendant's Proposed Findings of Fact at 146-153, 56-59. These include a substantially higher monthly service package since the level of care is a hospital, together with a need for the Medicaid agency to have physicians under contract to review medical necessity claims. *Id.*

**4. In Addition To Programmatic Changes That Are Unreasonable, The Costs That Would Be Incurred By Enjoining The Defendant To Provide Any One Or All Of The Changes Sought Above Are Not Reasonable.**

*Olmstead* teaches that a disabled Plaintiff who seeks a modification to the State's Medicaid programs pursuant to the ADA and Section 504 must do more than compare the costs of in-home care to institutional care and must do more than compare the costs of his in-home care to the State's budget for services to the disabled. Plaintiff here has not put on any evidence to show that the costs of the modifications to the programs that she seeks for Eric are reasonable. Indeed, Plaintiff did not put on any proof to show what the cost of 16 hours per day of in-home private duty nursing for Eric would be to the State of Illinois. The closest Plaintiff's evidence came was speculation that the costs of Eric's in-home care would be less than the $3,000.00 per day it would cost for Eric to receive care at Edward Hospital.[2]

Defendant established by reliable and reasonable expert evidence and reliable opinion evidence that the State of Illinois could be subject to unreasonably large costs if Plaintiff were to prevail in this case. Defendant's Proposed Findings of Fact at 154-194. The liabilities identified are a very real possibility because *Alexander v. Choate*, 469 U.S. 287, 308 (1985) requires the State to administer its programs with an even hand and protect other disabled individuals from discrimination. Plaintiff's theory of liability is based on purported medical need alone. The potential liabilities the State faces are also a very real possibility when coupled with Plaintiff's belief that HSP services should be given on the basis of the participants' physicians'

[2] Plaintiff's evidence, even if it were not speculative, completely failed to take account of how Defendant actually reimburses hospitals for care provided to Medicaid-eligible persons. Defendant's Proposed Findings of Fact at 136-39.

prescriptions. Evidence that the removal of the nursing facility cost comparison would be a fundamental alteration to the HSP is the likelihood for subjecting the State of Illinois to multi-million dollar liabilities on an annual basis were such cost caps to be removed. Defendant's Proposed Findings of Fact at 154-194. Credible and reliable opinion evidence establishes that, were the cost-neutrality requirements disregarded, demand for HSP services would drive up the program's costs unreasonably. *Id.* Additionally, Defendant adopts all the arguments and authorities set forth in his Response to Plaintiff's Motion *in Limine* Concerning Todd D. Menenberg and his Response to Plaintiff's Motion *in Limine* Concerning Matthew Werner as his argument here. *See* Civil Docket, 01 C 9551 at Doc. Nos. 148, 150. Accordingly, Defendant is entitled to judgment in his favor as to Counts VI and VII of Plaintiff's Complaint.

**5. To Enjoin Defendant To Modify The Programs To Give Eric Any One Or All Of The Changes Sought Above Would Fundamentally Alter The Medicaid Program.**

Defendant adopts and incorporates all the arguments and authorities set forth in Argument II(C)(1)-(4) as his arguments here. The modifications Plaintiff seeks to the Medicaid program to enable Eric to receive services at home are not reasonable on a programmatic basis and would potentially subject the State of Illinois to millions of dollars in additional liability on an annual basis. Thus, the relief that Plaintiff seeks, if granted, would fundamentally alter the Home Services Program and Persons with Physical Disabilities Medicaid Waiver. Defendant is entitled to judgment on his Affirmative Defenses 1 and 2.

WHEREFORE, for the foregoing reasons, Defendant prays that judgment be entered in his favor on all claims and defenses and against Plaintiff.

Respectfully submitted,

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