No. 02-3657

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DONNA RADASZEWSKI, guardian
for ERIC RADASZEWSKI,
Plaintiff-Appellant,

v.
JACKIE GARNER, Director, Illinois
Department of Public Aid,
Defendant-Appellee.

Appeal From The United States District Court
For The Northern District of Illinois,
Eastern Division

Case No. 01 CV 9551
The Honorable Judge John W. Darrah

BRIEF AND REQUIRED SHORT APPENDIX OF PLAINTIFF-APPELLANT, DONNA RADASZEWSKI

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Plaintiff-Appellant,	)	
v.	)	No. 01 C 9551
JACKIE GARNER, Director, Illinois Department of Public Aid,	)	
Defendant-Appellee.	)	The Honorable John W. Darrah, Judge Presiding.

DISCLOSURE STATEMENT

The undersigned attorney, pursuant to Seventh Circuit Rule 26.1, hereby certifies that Prairie State Legal Services, Inc. is the only law firm which has represented, or is expected to represent, the plaintiff in the present case.

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APPELLANT'S JURISDICTIONAL STATEMENT

A. Basis for the District Court's Jurisdiction

Plaintiff Donna Radaszewksi originally brought this action against the then Director of Illinois Public Aid, Ann Patla, in state court, alleging five causes of action resting on Illinois law. Radaszewski v. Patla, No. 00 CH 1475, in the Circuit Court for the Eighteenth Judicial Circuit in DuPage County. Plaintiff filed a Supplemental Complaint adding two causes of action based on federal law: Count VI based on violation of Title II of the Americans with Disabilities Act, 42 U.S.C. §§12132 *et seq*., and Count VII based on violation of the Rehabilitation Act of 1973, 29 U.S.C. §794. On December 14, 2001, defendant removed the case to federal court. Upon plaintiff's motion for remand, the district court entered an Order remanding Counts I-V of plaintiff's Supplemental Complaint that were based exclusively on Illinois law, and retaining jurisdiction of the two counts based on federal law under 28 U.S.C. §1441(b), §1331.

B. Basis for Appellate Jurisdiction

Appellate jurisdiction of the district court's final order is proper under 28 U.S.C. §1291 and Rules 3 and 4 of the Federal Rules of Appellate Procedure.

C. and D. Filing Dates/Assertion of Appellate Jurisdiction

On September 10, 2002, the district court entered judgment on the pleadings for defendant on both federal counts pending before it. This is a final order, resolving all claims pending before the district court. Plaintiff timely filed her notice of appeal on October 9, 2002.

ISSUES PRESENTED FOR REVIEW

I. Is judgment on the pleadings for the state defendant proper where plaintiff has alleged facts that defendant has violated the Rehabilitation Act of 1973 by restricting provision of the nursing services her disabled son needs to an institutional setting only and by refusing to

continue to provide those services in his home, even though the home-based services are more cost-effective?

II. May plaintiff pursue a claim seeking prospective injunctive relief for violation of Title II of the ADA against defendant Director of the Illinois Department of Public Aid in her official capacity pursuant to the doctrine of *Ex Parte Young,* 209 U.S. 123 (1908) where the claim against the Department itself is barred by the Eleventh Amendment?

STATEMENT OF THE CASE

Plaintiff's son, Eric Radaszewski, was diagnosed with brain cancer when he was 13 years old. Due to the effects of the cancer, the surgical, radiation, and chemotherapy treatment, and a subsequent mid-brain stroke, Eric is medically fragile with complex medical needs. The Illinois Medicaid program funded nursing services for Eric in his home until he turned 21 under a program for Medically Fragile, Technology Dependent Children. When Eric turned 21, the Department restricted the funding of the nursing services to such a degree that Eric would have no choice but to go to an institution to receive the level of care he requires.

Eric's mother, Donna Radaszewski, filed suit in the United States District Court for the Northern District of Illinois on September 1, 2000, alleging violation of provisions of the Medicaid statute, 42 U.S.C. §1396 *et seq.* and Constitutional due process and sought to continue nursing services to Eric in his home. On that date, the district court granted plaintiff's motion for a temporary restraining order. However, on November 6, 2000, the district court denied Ms. Radaszewski's Motion for a Preliminary Injunction finding that plaintiff had failed to establish that she had a private right of action under 42 U.S.C. §1983.

Ms. Radaszewski appealed to this Court on November 6, 2000, in Civil Number 00-

3929, *Radaszewski v. Patla*. Her motion for an injunction pending appeal to continue the nursing services was denied by the Court on November 16, 2000. She filed suit in the Circuit Court of the Eighteenth Judicial Circuit in DuPage County, Illinois, on December 1, 2000, seeking an injunction to maintain Eric's medical services. The state court suit was based solely on claims made under Illinois law. The circuit court granted Ms. Radaszewski's motion for a temporary restraining order on December 19, 2000, reestablishing Eric's hours of nursing services at home to what they had been before he had turned 21. That temporary injunction is presently in effect.[1]

While appeal in the prior litigation was pending before this Court and while the state court proceeding was pending, defendant's predecessor, on December 1, 2000, sought approval from the United States Department of Health and Human Services to eliminate private duty nursing from its Medicaid Plan for persons age 21 and over. Approval was obtained on February 2, 2001. Based upon the amendment to the State's Medicaid Plan and upon defendant's motion, this Court dismissed the pending appeal as moot on March 8, 2001. On October 15, 2001, Ms. Radaszewski, responding to defendant's motion to dissolve the injunction and dismiss the state case, filed a Supplemental Complaint alleging new counts for violation of Title II of the ADA, 42 U.S.C. §12132 and section 504 of the Rehabilitation Act, 42 U.S.C. §794.

On December 14, 2001 defendant removed the state case to the court below. Plaintiff filed a motion to remand on January 14, 2001 and on April 30, 2002 the court below remanded the state claims but retained plaintiff's claims based upon Title II of the ADA and section 504 of

[1] The history of the proceedings of this dispute is set out in greater detail in plaintiff's memorandum in support of her motion to remand filed in the court below. Pages one through four of that motion are included in the Appendix. (App. p. A-30).

the Rehabilitation Act. Defendant filed a motion for judgment on the pleadings in the court below and on September 11, 2002, the court below granted defendant's motion.

STATEMENT OF FACTS

Eric Radaszewski is 23 years old and is disabled. (App. p. A-10). In early 1992, he was diagnosed with brain cancer and a year and one half later he suffered a stroke. (App. p. A-11). As a result, Eric has been and is highly, medically, fragile. (App. p. A-11). Since July of 1994, Eric has lived at home receiving 24 hours of nursing care each day. (App. p. A- 11). In August of 1995, when the family's medical insurance benefits capped out, Eric began receiving registered nursing care at home under the Medicaid program. (App. p. A-11). Eric was found eligible for the state's Medicaid waiver program for Medically Fragile, Technology Dependent Children.[2] (App. p. A-41). In evaluating the amount of in-home services a child in this waiver program may receive, the Illinois Department of Public Aid (the Department) compares the cost of care the child would require in the institutional setting– a hospital or a pediatric skilled nursing facility–that would otherwise be necessary for the child. 89 Ill.Admin.Code §140.645(c)(3).

Based on the estimated cost for the level of the care Eric would need in an institution, the Department's agents approved a plan of care for Eric consisting of 16 hours per day of skilled nursing services, with an additional 336 hours per year of nursing services to allow Eric's parents respite. (App. p. A-11). Eric's parents provided Eric the balance of the 24 hours care Eric

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[2] Under 42 U.S.C. §1396n(c), states may request that HHS approve waivers of certain federal Medicaid requirements in order to develop community-based treatment alternatives. The three requirements that may be waived are state-wideness, comparability of services and community income and resource rules for the medically needy. For example, in a waiver program, states may seek federal approval to offer certain services only to persons who need them to avoid institutionalization rather than to all persons statewide who qualify for Medicaid. Services provided by a waiver supplement the State's basic Medicaid Plan.

requires. *Id.* The Department approved this care plan annually until Eric turned 21. (App. p. A-13).

On August 5, 2000, Eric turned 21. (App. pp. A-10, A-41). In setting the standards of the waiver under which Eric received assistance, the Department has limited services to persons under 21. (App. pp. A-13, A-41). Eric nevertheless remained eligible for nursing services at home under the then existing State's basic Medicaid Plan. (App. p. A-12). Instead of evaluating Eric's eligibility for nursing services at home included in the State's basic Plan, the Department took the position that the only way that Eric could receive the nursing services that he requires was to leave his home and enter an institution. (App. pp. A-25, A-41- 43). Subsequent to the filing of this case in state court, the Department sought and obtained approval from the United States Department of Health and Human Services to eliminate nursing services at home under its basic Medicaid Plan. (App. p. A-19). Although he is eligible for another waiver program called the Home Services Program, the funding cap the Department has established for this waiver would reduce the amount of nursing services Eric would receive at home to five hours a day. (App. pp. A-13, A-40). This level of service is insufficient to permit Eric to continue to reside at home, and the only alternative offered by state officials for Eric to receive the nursing services he requires is to move into an institution. (App. pp. A-11, A-42).

Eric's medical professionals are of the opinion that it is critical for Eric to continue to receive nursing services in his home. (App. pp. A-14, A-41, A-42). His treating physician believes that a skilled nursing facility could not meet Eric's needs. (App. p. A-14). Defendant's predecessor, in an administrative decision, agreed. (App. p. A-14). The alternative to in-home services for Eric is a hospital, a location where the Department agrees that

it will pay for Eric's necessary nursing services. (App. p. A-26). The Department has acknowledged that paying for Eric's nursing services at home is cheaper than it would be if he had to receive them in a hospital. (App. A-41).

Because he has received needed services at home, Eric has been able to benefit from the loving care of his parents who interact with him on all aspects of daily activities including preparing the food he likes, helping him with his homework, talking with him, playing games, watching sporting events together and engaging in physical play. Eric has participated in several educational activities while living at home. (App. pp. A-34-A-36). He attends the College of DuPage with the assistance of a registered nurse.(App. pp. A-37 - A-38).[3]

SUMMARY OF ARGUMENT

This case is before this Court because the court below granted defendant's motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure. Ms. Radaszewski has had no opportunity for discovery and no opportunity to present evidence on her claims. This Court in *Forseth v. Village of Sussex*, 199 F.3d 363, 368 (7th Cir. 2000), has explained that judgment on the pleadings is subject to *de novo* review, that all well pled allegations in the complaint are to be taken as true and that all reasonable inferences are to be made in favor of the plaintiff. The Court further explained in *Forseth* that judgment on the pleadings should be upheld only if appears beyond doubt that plaintiff cannot prove any facts that would support the claim for relief pled in the complaint. Id.

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[3] This Court has explained that in considering a judgment on the pleadings, it may take into account any possible facts that would support the alleged claim for relief including plaintiff's supplement of the complaint with factual narration in an affidavit or a brief. See *Forseth v. Village of Sussex*, 199 F. 3d 363, 368 (7th Cir. 2000)

The questions raised in this appeal are whether the allegations of the pleadings set forth valid claims under Title II of the Americans with Disabilities Act, 42 U.S.C. §12132 *et seq.,* or section 504 of the Rehabilitation Act, 29 U.S.C. §794. The relevant facts upon which this Court should make that determination are as follows:

Eric Radaszewski is disabled and eligible for Medicaid services. For the six years prior to his 21st birthday, the Illinois Medicaid program paid for Eric to receive nursing services he needs in his home. The Department's agents determined that it was appropriate to provide Eric this care in his home, and that it was cheaper than paying for Eric's care in an institution. Nothing has changed since Eric turned 21. He still needs extensive nursing services, and it is still cheaper to provide him those services at home than in an institutional setting. The Department does not contest that it will provide Eric with the "necessary long term care services he needs." (App. A-26). It asserts it will pay for the nursing care Eric needs in an institutional setting only. It refuses to continue to provide that care in the most integrated setting appropriate for Eric–his home.

The Department's inflexible position is especially grievous in this case, since the State will not save money by forcing Eric into an institution, yet it will place Eric's life at imminent risk and cut him off from the continuous nurturing support his family has given him since the onset of his disabilities. The Department's refusal to modify its policies and continue to provide Eric the nursing services he needs at home, leaving Eric no choice except unjustified segregation and isolation in an institution, is unlawful discrimination under both Title II of the ADA and Section 504. In *Olmstead v. L.C.*, 527 U.S. 581 (1999), the United States Supreme Court held that unjustified segregation of disabled persons into an institution as a prerequisite to receiving

services offered by the state is unlawful discrimination and the burden is on the state to demonstrate that its failure to provide such services in the community is a fundamental alteration to its programs such that it cannot reasonably accommodate such a result. *Olmstead*, 527 U.S. at 602. The facts before this Court indicate that the Department restricts the location of its services to Eric Radaszewski to an institution, even when that location is not necessary. Those facts also indicate that the cost of providing those services is less in the community than in an institution. There are no other facts in the record concerning whether providing such services in the community would result in a fundamental alteration of the Department's programs. Judgment based upon these pleadings was inappropriate. Plaintiff has stated valid claims under both Title II of the ADA and section 504 of the Rehabilitation Act.

The court below did not reach the merits of the Title II claim because it found that this Court's decision in *Walker v. Snyder*, 213 F.3d 344, (7th Cir. 2000), *cert denied*, 531 U.S. 1190 (2001) precluded an action under Title II of the ADA in federal court. Nevertheless, the court below recognized that the standards under which violations occur under Title II of the ADA and Section 504 are the same. (App. A-8). The district court's order, based on an erroneously narrow interpretation of discrimination and facts not found in the Supplemental Complaint should be reversed.

The court below dismissed Ms. Radaszewski's claim under Title II of the ADA based upon the Court's decision in *Walker v. Snyder*, 213 F.3d 344 (7th Cir. 2000), *cert. denied*, 531 U.S. 1190, 121 S. Ct. 1188 (2001), that only the entity and not an individual could be a defendant and that the doctrine of *Ex Parte Young* did not apply. Plaintiff submits that three recent decisions of the United States Supreme Court, two of them subsequent to this Court's decision in

Walker, and the legislative history of Title II of the ADA constitute bases for this Court to reconsider its decision in *Walker* and find that defendant is a proper party under Title II of the ADA.

ARGUMENT

I. Plaintiff Has Stated a Valid Claim for Relief Under Section 504 of the Rehabilitation Act .

Plaintiff's Supplemental Complaint states claims under Title II of the ADA, 42 U.S.C. §§12131-12165, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794(a). Section 504 provides that no qualified person with disabilities 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). Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, program or activities of a public entity, or be subjected to discrimination by such entity." 42 U.S.C §12132. The district court concluded, and the parties below agreed, that Section 504 is materially identical to and the model for the ADA, except that Section 504 is limited to programs receiving federal financial assistance. (App. p. 8, citing, *Rothman v. Emory University*, 123 F.3d 446, 451 (7th Cir. 1997), and *Crawford v. Indiana Department of Corrections*, 115 F. 3d 481, 483 (7th Cir. 1997)). Courts apply the same standards for deciding claims based on Title II of the ADA and Section 504. *Id*. Title II of the ADA was enacted to extend the protections and rights afforded to persons with disabilities beyond programs receiving

federal assistance and to clarify Congress' intent to eliminate segregation of persons with disabilities from American society. *Helen L. v. DiDario*, 46 F.3d 325, 332-333.(3d Cir. 1995). The Illinois Medicaid program is federally funded, so Section 504 and Title II of the ADA both apply here.

A. The Supreme Court's Decision in *Olmstead v. L.C.*: Unjustified Segregation is Discrimination.

In *Olmstead v. L.C.*, the Supreme Court decided that unjustified segregation of persons in institutions severely limits their exposure to the outside community and is discrimination based on disability prohibited by Title II of the ADA. *Olmstead*, 527 U.S. at 597. States violate the ADA when they limit health care services to institutional settings for people with disabilities who want to be served and can be appropriately served in a home or community based setting, and the states cannot show adequate justification for the limitation. Id. The two plaintiffs had developmental disabilities and mental illness and lived confined in Georgia's state-run psychiatric hospital. They waited for years for Medicaid funded community-based placement that their physicians recommended. Georgia argued its failure to provide the plaintiffs the services they needed in a community-based setting was not discrimination due to their disabilities. It argued that it was already using all available funds to provide home based services to other persons and that a court order directing the state to transfer the plaintiffs to the community would fundamentally alter its services. *Olmstead*, 527 U.S. at 598.

The Court rejected Georgia's argument that discrimination encompasses only uneven treatment of persons with disabilities as compared to persons without disabilities. Instead, the Court found "we are satisfied that Congress had a more comprehensive view of the concept of

discrimination advanced in the ADA." *Olmstead*, 527 U.S. at 598. The Court stated directly that "unjustified isolation ... is properly regarded as discrimination based on disability." *Olmstead*, 527 U.S. at 597. In reaching its conclusion that unjustified isolation of persons with disabilities in institutions is in itself a form of discrimination, the Court looked at the history of the ADA, its text, and the implementing regulations promulgated by the Attorney General. The Court placed particular emphasis on the Congressional findings set out in the beginning of the ADA, that "historically, society has tended to *isolate and segregate* individuals with disabilities, and despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;" that "discrimination against individuals with disabilities persists in such critical areas as *institutionalization*...; " and that "individuals with disabilities continually encounter various forms of discrimination, including .... failure to make modifications to existing facilities and practices... [and] *segregation*....42 U.S.C. §§12101(a)(2),(3),(5)." *Olmstead*, 527 U.S. at 588 (emphasis added).

The Court emphasized that in the text of the ADA, Congress directed the Attorney General to issue regulations to implement Title II of the ADA. *Olmstead*, 527 U.S. at 601. Congress specified that these regulations should be consistent with the Attorney General's regulations applicable to recipients of federal funds under §504. 42 U.S.C. §12134(b). One of those §504 regulations, known as the "integration regulation," requires that "recipients [of federal funds] shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." 28 C.F.R. §41.51(d). The Attorney General had followed Congress' ADA directive and promulgated an integration regulation patterned on 28 CFR §42.51(d): "a public entity shall administer its 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).

In analyzing and affirming the Attorney General's rationale for the integration regulation, the Court observed that institutional placement of persons who can live and benefit from community settings perpetuates unwarranted assumptions that persons isolated in institutions are incapable or unworthy of community life. *Olmstead*, 527 U.S. at 601. Confinement in an institution severely diminishes the everyday life activities of individuals with disabilities, impairing among other things, their family relations, social contacts and cultural enrichment. *Id*. Given Congress' stated purposes for enacting the ADA, its confirmation of the Section 504 integration regulation within the text of the ADA, and the deleterious effects of isolation and segregation on the lives of persons with disabilities, the Court concluded that "unjustified isolation...is properly regarded as discrimination based on disability." *Olmstead*, 527 U.S. at 597.

A plurality of the Court concluded that Georgia could defend against the integration mandate if it could prove that delivery of services in the community would result in a fundamental alteration of its programs and activities. *Olmstead*, 527 U.S. at 603. The plurality based this conclusion on the Attorney General's regulation requiring public entities to make reasonable modifications in their practices when necessary to avoid discrimination on the basis of disability, unless the entity can show that the modification would fundamentally alter the nature of the service, program or activity. 28 C.F.R. §35.130(b)(7). The plurality specified that in evaluating a fundamental alteration defense, however, the court must review, in light of the resources available to the state, the cost of providing community-based services, the range of

services the state provides to others, and the obligation to mete out services equitably. *Olmstead*, 527 U.S. at 597. In taking the integration and the reasonable modification regulations together with the express purposes of the ADA, the plurality determined that:

> states are required to provide community-based treatment for persons with mental disabilities when the States' treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.

Olmstead, 527 U.S. at 607.

The congressional findings in the ADA's text were a key aspect of the Court's determination that unjustified segregation is discrimination. The legislative history of the ADA is replete with references demonstrating Congress' core concern was ending segregation of persons with disabilities The legislative history provides an important guide for evaluating not only what conduct constitutes discrimination under the ADA, but also for evaluating what alteration would be so fundamental that it would permit public entities to continue segregationist policies. The House Report includes several such statements :

> As in the finding 35 years ago by the Supreme Court in Brown v. Board of Education ... segregation for persons with disabilities may affect their hearts and minds in a way unlikely ever to be undone.
> ....
> The ADA is a comprehensive piece of civil rights legislation which promises a new future of inclusion and integration and the end of exclusion and segregation.
> ....
> The purpose of Title II is to continue to break down barriers to the integrated participation of people with disabilities in all aspects of community life....

H.Rep. No. 101-485, Part III, 101st Cong., 2d Sess.(1990) at 26, 49. The Senate Report contains similar statements confirming the concerns that "isolation and discrimination is still pervasive in our society" and "one of the most debilitating forms of discrimination is segregation."S. Rep. No.

101-116, 101st Cong., 1st Sess. (1989) at 6.

During Senate hearings on the ADA, former Senator Lowell Weicker, key sponsor of the ADA when it was first introduced in 1988, testified about the ongoing segregation in institutions faced by persons with disabilities:

> For years, this country has maintained a public policy of protectionism toward people with disabilities. We have created monoliths of isolated care in institutions and segregated education settings. It is that isolation and segregation that has become the basis of the discrimination faced by many disabled people today. Separate is not equal. It was not for blacks; it is not for the disabled.

Americans with Disabilities Act, Hearing before the Senate Committee on Labor and Human Resource and the Sub-Committee on the Handicapped, 101st Cong., 1st Sess., at 215 (1989). In his remarks introducing the bill, Senator Harkin stated that one of the ADA's purposes is "getting people ... out of institutions...." 135 Cong. Rec. S4986 (daily ed. May 9, 1989). Congressman Miller, a co-sponsor in the House commented that "it has been our unwillingness to see all people with disabilities that has been the greatest barrier to full and meaningful equality. Society has made them invisible by shutting them away in segregated facilities. 136 Cong. Rec. H2447 (daily ed. May 17, 1990).[4]

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[4] These entries from the legislative history had been cited in to the Olmstead Court in the Brief for Respondents, *Olmstead v. L.C. by Zimring*, 1998 U.S. Briefs 536. These same concerns motivated Section 504. As set forth by the district court in *Frederick L. v. Department of Public Welfare*, 157 F.Supp.2d 509, 534:

> in enacting Section 504, Congress intended to provide for the integration of handicapped persons into mainstream society. The legislative history of the provision contains expressions of this goal. See e.g., 118 Cong.Rec. S3320 (statement of Sen. Williams)(section 504 was intended to 'achieve the tragically overdue goal of full integration of the handicapped into normal community living....). The purpose of Section 504 has been confirmed by Congress since its enactment...See, e.g., S.Rep. No. 95-890 at 39 (1978)(in adopting Section 504, 'Congress has made a commitment to the handicapped that, to the maximum extent possible, they shall be fully integrated into the mainstream of life in America'); 135 Cong.Rec. 8507(statement of Sen. Harkin)('One of

Olmstead followed some key cases in the lower courts that recognized Congress intended to eliminate unnecessary segregation and institutionalization of persons with disabilities through the ADA and Section 504. *Helen L. v. DiDario*, 46 F.3d 325, 329(3d Cir. 1995) cert. denied, *Pennsylvania Secretary of Public Welfare v. Idell S.* ,513 U.S. 813 (1995), *Williams v. Wasserman*, 937 F.Supp 524 (D.Md. 1996), *Kathleen S. v. Department of Public Welfare of Comm. of Pa.*, 10 F.Supp.2d 460, 466-471 (E.D.Pa. 1998), *Cramer v. Chiles*, 33 F.Supp.2d 1342 (S.D.Fl. 1999), *Rolland v. Cellucci*, 52 F.Supp.2d 231, 236-237 (D.Mass. 1999). The Third Circuit's 1995 decision in *Helen L.* was the groundbreaking case in finding that persons with disabilities are entitled to receive treatment in the most integrated setting appropriate to their needs. The plaintiff, a 43 year old mother left paralyzed after contracting meningitis, needed help with some of the essential activities of daily living, like bathing and shopping, but she could do others on her own. She did not need the skilled nursing services of a nursing home, but she was forced to remain in a nursing home apart from her family so that she could obtain the attendant care services for the daily activities she could not do without help. After four years in a nursing home, she was found eligible for a program that would provide her the attendant care services she needed in her own home, but she was placed on a waiting list because the home-based program lacked funding. After another year separated from her family in the nursing home, she brought suit under Title II of the ADA, claiming that the Department of Public Welfare had violated the integration mandate by forcing her to live in the segregated setting of a nursing home. *Helen L.*, 46 F.3d 325, 329(3d Cir. 1995) cert. denied, *Pennsylvania Secretary of*

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the precepts of Section 504 is that segregation of people with disabilities will not be tolerated.').

Public Welfare v. Idell S., 513 U.S. 813 (1995).

The district court in *Helen L.* entered summary judgment for the state defendant, concluding that the state had not discriminated against the plaintiff on the basis of her disability but had been unable to provide her home-based services due to insufficient funds. *Helen L.*, 36 F.3d at 329. The Third Circuit reversed, holding that under Title II of the ADA, persons with disabilities are entitled to receive services in the most integrated setting appropriate to their needs. The court examined the legislative history of both Section 504 and of the ADA, as well as the history of the Attorney General's integration regulations under both statutes, 28 C.F.R. §41.51(d). and 28 C.F.R. §35.130, and concluded that "integration is fundamental to the purposes of the Americans with Disabilities Act" and that the "ADA and its attendant regulation clearly define unnecessary segregation as a form of discrimination against the disabled." *Helen L.*, 36 F.3d at 330-333.

Pennsylvania argued in *Helen L.* that it could not provide the community based attendant care services plaintiff needed in order to leave the nursing home without fundamentally altering its health system. It claimed that funding for both nursing homes and the community-based attendant care program had already been set, and that under the state's constitution, monies could not be transferred from one program to the other. The court was unpersuaded by the asserted lack of funding and entered judgment for the plaintiff as a matter of law. *Helen L.*, 46 F.3d at 339. Quoting from the House Report on the ADA, the court cautioned that the interpretation of the meaning of a fundamental alteration must be weighed against the core purpose of the ADA and Rehabilitation Act to eradicate segregation:

As with Section 504 of the Rehabilitation Act, *integrated services are essential to*

> *accomplishing the purposes of Title II [of the ADA]*....the goal is to eradicate the 'invisibility of the handicapped.' ... Separate but equal services do not accomplish this central goal and should be rejected. The fact that it is more convenient, either administratively or fiscally, to provide services in a segregated manner, does not constitute a valid justification for separate or different services under Section 504 of the Rehabilitation Act or under Title II of the ADA. H.Rep. 485(III), 101st Cong.2d Sess. 50 *reprinted in* 1990 U.S.C.C.A.N. at 473.

Helen L., 46 F.3d at 338 (emphasis in the original).

Since *Helen L.* and the Supreme Court's decision in *Olmstead*, a number of lower courts have concluded that unnecessary segregation of persons with disabilities in an institution is discrimination and states must prove an asserted defense of fundamental alteration. *See, e.g.*, *Bryson v. Shumway* 177 F.Supp.2d 78, 99 -101 (D.N.H.,2001), *Lewis v. New Mexico Dept. of Health*, 94 F.Supp.2d 1217, 1237 -1239 (D.N.M.,2000), *Makin ex rel. Russell v. Hawaii,* 114 F.Supp.2d 1017, 1034 (D.Haw.1999) ("[I]f a state is found to have discriminated against disabled individuals through the administration of a program, it must modify the program to remedy the situation unless it can prove that any modification would fundamentally alter the program."). Courts that have ultimately concluded that the requested services would constitute a fundamental alteration for the state did so after close analysis of the state's cost-based defense. *Frederick L. v. Department of Public Welfare*, 217 F.Supp.2d 581 (E.D. Pa. 2002), *Williams v. Wasserman*, 164 F. Supp.2d 591 (D. Md. 2001).

B. Plaintiff Has Pled Sufficient Facts to Show Unlawful Discrimination Under *Olmstead*.

Olmstead applies to Eric's situation, but unlike the plaintiffs in *Olmstead* who sought to get into the community, the state has been providing Eric cost-effective skilled nursing services in his own home. Turning *Olmstead* on its head, the Department's policies will push him out of that successful setting into an institution, for the remainder of his life. Eric needs nursing services.

The Illinois Medicaid program pays for nursing services, both in institutions and through its waiver programs for home-based care. The most integrated and appropriate setting for those services is his home. The benefit of home-based nursing services to Eric cannot be overstated. In the opinion of his physician, they are the reason Eric is alive. Nonetheless, the Department refuses to continue to spend the same amount of money or less for skilled nursing services to sustain Eric in the community. Under *Olmstead*, these facts establish a *prima facia* case of discrimination. Although the district court agreed that all facts alleged in the complaint must be taken as true and all reasonable inferences drawn in favor of the plaintiff, it omitted a key factual allegation in its recitation of the facts: that it is less expensive to continue to provide Eric the nursing services he has received in his home than to pay for that care in an institution. (App. A-21).

Although the Supreme Court in *Olmstead* recognized that the state may assert a defense by showing the modification the plaintiff seeks would work a fundamental alteration on the state's program, it is a defense the state must prove. The trial court must weigh the factors of a fundamental alteration defense, set out in the plurality's decision. This case has not progressed beyond the pleadings phase. Plaintiff has had no discovery on the actual burden the modification in policy Eric seeks would impose on the state. The record at this stage shows only that Eric needs and wants continued nursing services in his home, that his home is the most integrated setting for the needed services, and that this continued delivery of services is at least as cost-effective as receipt of the services of an institution.

To the extent it is deemed appropriate to consider a defense of fundamental alteration at this stage, without factual examination of the cost and burden on the state, plaintiff contends that

no such fundamental alteration is required and that through very small modifications in its existing Medicaid program, Defendant could continue to provide cost-effective nursing services at home for Eric. Like Georgia, Illinois has home and community based service plans in place. Eric started receiving nursing services under one of them -- the Department's Medicaid waiver program for Medically Fragile, Technology Dependent Children -- in August 1995. Since then he has received 16 hours per day private duty nursing services in his home with an additional annual 336 private duty nursing respite hours to spell his parents. The Department's agents approved and arranged this service plan year after year. It was based on the determinations that Eric needed the nursing services, that he could benefit from those services at home, and that it would be not more expensive to provide Eric those services at home than to pay for the institutionalization he would otherwise require.[5] These determinations are also the key elements of the *Olmstead* analysis.

Eric also meets the qualifications for the Department's Medicaid waiver program for disabled adults–the Home Services program. When Eric turned 21, the Department's agents evaluated Eric for continued nursing services at home under this program, but used a formula that capped the funding he could receive to an amount that would pay for only five hours nursing services per day. That cap, however, is too low to allow Eric to remain in the community.

By altering its policies and procedures very little to expand its current home and community based services plans, the Department could continue to provide Eric services in his home at *no extra cost*. The Department could waive the age cap for participants in the waiver

[5] The regulations for this waiver program provide that the client requires the level of care provided by a hospital or nursing facility, that the care can be appropriately provided outside of an institution, and that the estimated cost to the State for care outside an institution for the client is not greater than the cost to the State for care of the client in an institution. 89 Il.Admin.Code §§140.645(c)(2),(3).

program for children who survive past age 21 and for whom cost of care in the community remains less than the cost of care in an institution. Alternatively, the Department could increase the funding cap under the Home Services Waiver Program to reflect the actual cost-effectiveness of home-based services, at least for cases in which cost-effectiveness has been established through years of experience in the children's waiver program. In neither event would the modification alter the essential nature of the programs–to provide appropriate, cost-effective services, including nursing services, to enable persons with disabilities to remain at home, integrated in their communities.

Because the state can accommodate Eric's need for services in the community at no extra cost, it is really a much easier case than *Olmstead*. The Court noted that Georgia needed to continue to operate state hospitals, with all the facility and personnel costs, for those persons with mental disabilities for whom community placement would not be appropriate or desired. The plurality felt this fact needed to be weighed in determining whether and the extent to which the *additional expense* increased or accelerated community based services would work a fundamental alteration on the State's program. That tension is not present is this case. Illinois does not run the hospital or nursing facilities that would provide Eric institutional care. Irrespective of whether Eric receives services at home, in a hospital or in a skilled nursing facility, Illinois will be paying private contractors. The Department's refusal to pay for the nursing services Eric needs to allow him to remain at home, when it will pay out those same dollars or more to pay for his institutional care, is exactly the unjustified segregation and isolation the *Olmstead* Court found to be unlawful discrimination.

This Court has recognized the assessment of what is a reasonable accommodation or a

fundamental alteration essentially requires a balancing of the benefit to the person with disabilities and the burden on the state entity. It is "highly fact- specific and determined on a case-by-case basis." *Washington v. Indiana High Sch. Athletic Ass'n., Inc.*, 181 F.3d 840, 846-848 (7th Cir.1999*)*. The court must weigh the cost to the defendant in making the accommodation against the benefit to the plaintiff. *Dadian v. Village of Wilmette* 269 F.3d 831, 838 -839 (7th Cir. 2001) (citing *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir.1995) and *United States v. Village of Palatine*, Illinois, 37 F.3d 1230, 1234 (7th Cir.1994)). At this stage of the proceedings, without evidence of costs to the state, judgment on the pleadings in inappropriate.

C. The District Court's Decision Ignored *Olmstead*

Although plaintiff's claim is founded on *Olmstead*, the district court's opinion does not mention the case. Its rationale is based on its conclusion that Section 504 and the ADA do not require the state to create new programs, and that these statutes only require even-handed treatment of persons with disabilities relative to persons without disabilities. (App. A-9). It also asserts that Illinois provides no in-home nursing services to anyone over age 21, ergo Illinois treats "handicapped" and "nonhandicapped" persons alike and plaintiff's discrimination claims must fail. Id. The court's conclusions, however, are not consistent with *Olmstead* or the record before it.

The district court relied on *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), *Alexander v. Choate*, 469 U.S. 287(1985) and *Traynor v. Turnage*, 485 U.S. 535 (1988), for its conclusion that Section 504 requires only evenhanded treatment of qualified handicapped persons relative to persons who do not have disabilities. (App. p.9). These cases, however, pre-date the Supreme Court's decision in *Olmstead*. In fact, the district court's definition of unlawful

discrimination was the definition put forward by the dissent in *Olmstead*, and the dissent cited these same three cases. *Olmstead*, 527 U.S. at 619-622. As described above, the Court rejected this definition of discrimination as too narrow. *Olmstead*, 527 U.S. at 598. Similarly, the majority rejected the dissent's opinion, also advanced by the district court in this case, that the case was really about a standard of care, finding instead that the plaintiffs were seeking the care Georgia provided and which they needed in the community rather than isolated in an institution. *Olmstead*, 527 U.S. at 603, n.14.

Based on its narrow definition of discrimination, the district court concluded that Section 504 and the ADA do not require the State to create and fund a program for the disabled that does not already exist. (App. p. 8). But this conclusion misses the point of the integration mandate. Public entities must provide services they in fact provide (here, nursing services) in the most integrated setting appropriate to the person with disabilities, unless to do so would work a fundamental alteration on the state's program. Integration into the community is a right under the ADA and Section 504, and a state must have a compelling reason for refusing to adjust its policies to achieve integration. Whether a state has an existing program that meets the needs of a person with disabilities consigned to an institution may be a factor in the factual examination of the burden on the state to provide more integrated services, but it cannot be a fundamental alteration as a matter of law. Otherwise, states could sidestep the integration mandate just by limiting all services to the institutional setting, regardless of the cost or burden on the state to provide alternative care in the community.

Moreover, the Department's existing home-based care program for adults also covers in-home skilled nursing services. The district court's statement that no one over 21 get in-home

nursing services is contradicted in its own recitation of the facts, where the court recounts how the Department approved funding the equivalent of five hours per day in home nursing for Eric once he turned age 21. (Compare App. p. A-6, A-9). Plaintiff alleges that the Department refuses to adjust its policies or procedures to continue the nursing services Eric needs to avoid institutionalization, even though continuing to provide the service would be cost-effective. Those allegations, if proven, establish unjustified segregation in violation of the integration mandate, sufficient to withstand a motion for judgment on the pleadings. [6]

The district court also relied on *Rodriguez v. City of New York*, 197 F.3d 611 (2d Cir. 1999). In *Rodriguez*, decided four months after *Olmstead*, the Second Circuit held that the ADA and Section 504 do not require New York to provide a certain service in the community described as "safety monitoring" that would assist persons with disabilities to remain in their homes. New York provided a range of other home-based personal care services. In rejecting the plaintiffs' claims for the service, the Second Circuit incompletely characterized the scope of discrimination prohibited under the ADA, stating that "the ADA requires only that a particular service provided to some not be denied to disabled persons." *Rodriguez*, 197 F.3d at 618. As described in detail above, that narrow definition of discrimination was rejected by the Court in *Olmstead*. The case

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[6] Rather than make small alterations in its policies and practices to make possible continued delivery of the services Eric needs in his home, the Department has done exactly the opposite and restricted its services. Prior to January, 2001, the Illinois Medicaid plan included coverage for private duty nursing services for Medicaid recipients generally. When the Department refused to provide the services in the State Medicaid plan to Eric, plaintiff sued to enforce the plan. While the case was pending on appeal before this Court, the State amended its plan to delete private duty nursing services outside of its waiver programs. The legality of the Department's procedure to make the change is the subject of the litigation the district court remanded to the state circuit court. Nonetheless, the Department took deliberate action contrary to the integration precepts set out in *Olmstead* by altering its plan to make community-based services less accessible.

is also distinguishable on its facts from the present case, since the safety monitoring services the plaintiff sought were not provided in an institution or in the community.

Consistent with *Olmstead*, the state must make reasonable modifications in its policies and procedures. The state has already decided that the home-based nursing services Eric has received for the past six years is not greater than the cost of Medicaid covered services he would need in the institutional setting appropriate for him. At no additional expense to its Medicaid program the Department can continue to provide Eric the services he needs, the services that are life-saving for Eric, in his home. Instead, inexplicably, the Department will force now 23 year old Eric into an institution, which, its own hearing office has acknowledged, will endanger Eric's life. Under *Olmstead*, defendant's actions constitute unlawful discrimination.

II Plaintiff may properly bring her claim under Title II of the ADA against defendant pursuant to *Ex Parte Young*.

Relying on this Court's decision in *Walker v. Snyder*, 213 F.3d 344 (7th Cir. 2000), *cert. denied*, 531 U.S. 1190, 121 S. Ct. 1188 (2001), the court below dismissed Eric's claim under Title II of the ADA. In *Walker*, a sight-impaired inmate of the Illinois Department of Corrections alleged a violation of Title II of the ADA for failure by the Department to accommodate his disabilities by furnishing books on tape, a brightly lit cell by himself, and transfer to a less restrictive prison. *Walker v. Snyder*, 213 F. 3d at 345.[7] In its decision, this Court reached three conclusions. First it determined that the proper defendant in suits brought under Title II of the

[7] The United States District Court had dismissed Walker's Title II ADA claim for failure to state a claim for which relief can be granted after determining that Walker had received the reading aids he was requesting and that his remaining claims were too vague to support relief. *Walker v. Washington*, 1998 U.S. Dist. LEXIS 9128 (N.D. Ill. June 11, 1998). Walker appeared *pro se* before the district court and the Seventh Circuit.

ADA is either the public entity or an official who stands in for that entity. [8] *Walker v. Snyder*, 213 F. 3d at 346. Second, the Court recognized the distinction between suing a state official personally and suing that official in his or her official capacity concluding, as the Eighth Circuit had found in *Alsbrook v. Maumelle*, 18 F.3d 995, 1005 n.8 (8th Cir. 1999)(en banc), "that as a rule there is no personal liability under Title II . . . ." 213 F.3d at 346. Finally, the Court stated that because Title II is drafted in terms of a public entity, a suit against a public official based upon the doctrine of *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908), is not possible because such a suit is an action against state officers as individuals and not against the state itself and the only proper defendant under Title II of the ADA is the public body as an entity. *Walker v. Snyder*, 213 F. 3d at 347. Thus, this Court, relying on the "entity" language contained in section 12132, found that the ADA barred utilization of *Ex Parte Young* as a means for an aggrieved person to obtain prospective injunctive relief against a public entity and that the recognized distinction between suing a state official in his or her official capacity as contrasted from his or her personal capacity did not change the result.[9]

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[8] Title II of the ADA at 42 U.S.C. §12132 provides:

> Subject to the provisions of this subchapter, 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.

[9] The Court of Appeals for the Eighth Circuit subsequently explained that its decision in *Alsbrook* did not constitute a rejection of a suit for prospective injunctive relief against a state official for violation of Title II of the ADA under the doctrine of *Ex Parte Young* and that there was a distinction between proceeding against a state official in his or her individual capacity (*Alsbrook*) and a suit against a state official in his or her official capacity. *Gray v. Wilburn*, 270 F.3d 607, 609 (8th Cir. 2001)

Plaintiff submits that the decision in *Walker* should be reconsidered and changed by this Court for three reasons. Two of those reasons emanate from three recent decisions of the United States Supreme Court, one of which was handed down a year before *Walker* and, the other two subsequent to the decision in *Walker*. Those reasons are as follows: First, the decision in *Walker* to restrict the application of *Ex Parte Young* and to not recognize the distinction between suits against state officials in their official as contrasted to personal capacities, conflicts with the established balance between the sovereign immunity of the States and the supremacy of laws arising under the Constitution and the laws of the United States as recognized by the United Supreme Court in *Alden v. Maine*, 527 U.S. 706, 119 S. Ct. 2240 (1999). Second, the Supreme Court's decisions in *Verizon Maryland. Inc. v. Public Service Commission of Maryland*, ___ U.S. ___, 122 S.Ct. 1753 (2002) and *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 121 S.Ct. 955 (2001), both issued subsequent to this Court's decision, have upheld the efficacy of *Ex Parte Young* in cases where the underlying federal statute upon which suit was brought, like 42 U.S.C. §12132, was drafted in terms of an entity. In contrast to *Walker*, in *Garrett*, the Supreme Court relied upon the distinction between suits brought against state officials in their official versus personal capacities to state its belief that *Ex Parte Young* suits were available under Title I of the ADA. *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. at 374, n. 9. Third, the effect of this Court's decision is to call into serious question the ability of any private individual to obtain redress from a state entity in any court. Such an effect is directly inapposite to the intent of Congress in enacting Title II of the ADA.

A. The Balance Between Sovereign Immunity and the Supremacy Clause

In *Alden v. Maine*, 527 U.S. 706, 119 S. Ct. 2240 (1999), the United Supreme Court

confronted the issue whether federal statutes could mandate that a state court consider a federal claim which would otherwise be precluded by the state's own interpretation of its sovereign immunity. In deciding that the state's declared sovereign immunity precluded suit against the state in state court and the Eleventh Amendment prevented suit in federal court, the Court specifically recognized the tension that existed between a state's immunity from suit and the need to enforce federal law under the Supremacy Clause stated in Article VI, Section 8 of the United States Constitution:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . ., shall be the supreme Law of the Land and the Judges in every State shall be found thereby, any Thing in the Constitution or Laws of any State to the Contrary, notwithstanding.

In explaining the resolution of that tension, the Supreme Court explained that although sovereign immunity precluded suits brought under federal statutes against the state entity in both federal courts under the Eleventh Amendment and state courts under sovereign immunity, suits for declaratory or injunctive relief brought against state officials in their official capacity under *Ex Parte Young* were necessary if the Constitution is to remain the supreme law of the land. *Alden v. Maine*, 527 U.S. at 747. In *Green v. Mansour*, 474 U.S. 64, 68, 106 S. Ct. 423 (1985) the Court explained:

> Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.

In other words suits against individual state officials in their official capacities was the means

available for a an aggrieved person to obtain relief from a violation of a federal statute. As this Court recognized in *Osteen v. Henley*, 13 F. 3d 221, 223 (7th Cir. 1993), "[t]he immunity that the Eleventh Amendment grants does not go so far as to allow state officials to ignore federal law with impunity."

B. Application of *Ex Parte Young* to Suits Brought Under Statutes that are Drafted in Terms of Entities

In two decisions issued subsequent to this Court's decision in *Walker*, the United States Supreme Court has approved suits brought against state officials under *Ex Parte Young* when the suit upon which the lawsuit was brought was drafted in terms of entities. *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, ___ U.S. ___, 122 S. Ct. 1753, (2002) was a case brought by a telecommunications provider under the Telecommunications Act of 1966, 47 U.S.C. §252(e). Verizon challenged a decision of the Public Service Commission of Maryland that had ordered it to make payments to another telecommunications provider. It brought suit in federal court against the Commission and its individual members pursuant to 47 U.S.C. §252(e)(6). That subsection provides:

> In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's action shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirement of section 251 of this title and section.

Maryland asserted immunity from suit in federal court based upon the Eleventh Amendment.

The Court responded that it need not reach the Eleventh Amendment issue since Verizon could bring suit against the individual commissioners in their official capacities, pursuant to the doctrine of *Ex Parte Young*. *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 122 S.Ct. at 1760. In so ruling, the Court explained that the process that a court must undertake in determining the applicability of *Ex Parte Young* is a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Maryland. Inc. v. Public Service Commission of Maryland*, 122 S.Ct. at 1760.

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

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

The significance of this explanation by the United States Supreme Court to this Court's decision in *Walker* is that just as Title II of the ADA, 42 U.S.C. §12132, is drafted in terms of

"public entities,"[10] the applicable provision of Title I of the ADA is similarly drafted. Section 12112(a) of Title 42 provides that:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

The statute defines a "Covered entity" as "an employer, employment agency, labor organization, or joint labor-management committee. " 42 U.S.C. §12111(2). This Court had previously noted that suits generally under the ADA, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e(b), and the Age Discrimination in Employment Act, 42 U.S.C. §630(b), had to be brought against the employer as an entity, rather than against an individual. See, *EEOC v. AIC Security Investigations*, 55 F. 3d 1276, 1280-1281 (7th Cir. 1995), and cases cited therein. Nevertheless in *Garrett*, when dealing with actions by a department of the State, the Supreme Court found that private individuals could sue to enforce the provisions of Title I under the *Ex Parte Young* doctrine. Since both Title I and Title II of the ADA apply to an "entity," the Court's determination that a private person can maintain a suit under the doctrine of *Ex Parte Young* under Title I also applies to suits brought under Title II.[11]

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[10] 42 U.S.C. §12131(1)(A) includes in the definition of a Public entity, any State or local government.

[11] The Court's decisions in *Garrett* and *Verizon* are consistent with its previous decisions regarding the liability of public entities by suits against officials brought against them in their official capacities. *Kentucky, DBA Bureau of State Police v. Graham*, 473 U.S. 159, 105 S. Ct. 3099 (1985) involved a claim against a state enforcement agency for attorney's fees. The Court explained that in a suit against state officials in an official capacity action, "the entity's policy or custom must play a part in the violation of federal law. 473 U.S. at 166. In this case, Ms. Radaszewski has alleged that "[u]nder the Department's policy, Eric may receive Medicaid payment for necessary long term care services in institutions, meaning skilled nursing facilities

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

> act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complaints is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional.[12]

In *Gregory v. Administrative Office of the Courts of the State of New Jersey*, 168 F. Supp. 2d 319 (D. N.J. 2001), involving allegations of violation of Title II of the ADA, the court explained that the *Ex Parte Young* doctrine has been called an "obvious fiction" because when a state official is sued to enjoin the enforcement of an official state policy, the real party in interest is the state and the suit proceeds as if the state had been the named party. 168 F. Supp. 2d at 327-29. Thus, a suit against a state official under such circumstances is a suit against an entity, the state, and is permissible under *Ex Parte Young*. In *Carten v. Kent State University*, 282 F.3d 391 (6th Cir. 2002), a suit brought by a university student against university officials alleging a failure to accommodate his disability in violation of Title II of the ADA, the court rejected the argument that Title II of the ADA imposes its requirement only on public entities. Instead, the court found

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and hospitals, but not at home." (Supplemental Complaint for Injunctive Relief, Count VI, Paragraph 40). Moreover, the seminal case regarding the obligation of the state to provide services in the community rather than in institutions for appropriate disabled individuals, *Olmstead v. L.C.*, 527 U.S. 581(1999), proceeded as a case against state officials for prospective injunctive relief no doubt under the authority of the doctrine in *Ex Parte Young*.

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

that under the doctrine of *Ex Parte Young* the state officials when acting in their official capacities are the entity. 282 F. 3d at 396.

In addition, the federal courts in this country, especially since the Supreme Court's decision in *Board of Trustees of the University of Alabama v. Garrett*, have consistently determined that actions brought under Title II of the ADA may proceed under the doctrine of *Ex Parte Young*. *Garrett* was decided on February 21, 2001. Since that time, the Courts of Appeals for the First Circuit, *Kiman v. New Hampshire Dept. of Corrections*, 301 F.3d 13, 17, n.2 (dicta), the Second Circuit, *Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn*, 280 F.3d 98, 115 (2nd Cir. 2001) (dicta), the Fifth Circuit, *Reickenbacker v. Foster*, 274 F.3d 974, 977 n. 9 (5th Cir. 2001) (dicta), the Sixth Circuit, *Carten v. Kent State University*, 282 F.3d 391, 396 (6th Cir. 2002) (suit by university student regarding accommodation of a disability), the Eighth Circuit, *Klingler v. Director, Dept. of Revenue*, 281 F.3d 776 (8th Cir. 2002) (suit alleging that fee charged for placards allowing use of accessible parking spaces to the disabled), and the Ninth Circuit, *Armstrong v. Davis*, 275 F.3d 849, 880 (10th Cir. 2002) (suit alleging failure to accommodate disabled prisoners) have so determined. No court of appeals since *Garrett* has found to the contrary.

Similarly, since the *Garrett* decision at least nine United States district courts have applied the *Ex Parte Young* doctrine to proceedings brought pursuant to Title II of the ADA.[13] Most of

[13] *Shepard v. Irving*, 204 F. Supp. 2d 902, 919 (E.D. Va. 2002) (disabled college student seeking accommodation of her learning disability), *A.A. v. Board of Educcation, Central Islip Union Free School District*, 196 F. Supp. 2d 259 (E.D. N.Y. 2002) (suit challenging supervision of special education by State), *Daigle v. Louisiana Dept. of Social Services*, 2002 WL 126647 (E.D. La.2002) (suit by college student to obtain reasonable accommodation of her disability), *Fetto v. Sergi*, 181 F. Supp. 2d 53, 75 (D. Conn 2001) (student challenging individual education plan), *Parker v. Michigan Dept. of Corrections*, 2001 WL 1736637 (W.D. Mich.2001) (failure of

these decisions have expressly followed footnote 9 of the decision in *Garrett*[14] and some have specifically rejected the argument that only an entity can be sued under Title II.[15] This Court has recognized the propriety of reconsidering a prior decision when intervening Supreme Court decisions affect that decision and especially if reconsideration will resolve a conflict among the circuit court of appeals. See, *Ashley v. nited States*, 266 F.3d 671, 674 (7th Cir. 2001), *Devines v. Maier*, 728 F.2d 876, 880 (7th Cir. 1984).

C. Contrary to Legislative Intent

The decision in *Walker* has closed the door in federal court for an aggrieved person to redress violations of Title II of the ADA by a state. A suit against the entity, under the decision, contravenes the Eleventh Amendment and suit cannot be brought against a state official in his or her official capacity. The decision concludes, "*Walker* must pursue all of his ADA theories in state court." But a suit in state court under Title II of the ADA becomes problematic because of

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prison to accommodate prisoner's disability), *Gregory v. Administrative Office of the Courts of the State of New Jersey*, 168 F. Supp. 2d 319, 330 (D. N.J. 2001) (hearing impaired man seeking accommodations in order to record court proceedings), *Doe v. Sylvester*, 2001 WL 1064810 (D. Del. 2001) (mentally impaired woman challenging restrictiveness of care), *Rowe v. Maine Dept. of Human Services,* 156 F. Supp. 2d 35, 60 (D. Me. 2001) (challenge to Maine's disenfranchisement of persons under guardianship by reason of mental disability), *Frederick L. v. Dept. of Public Welfare*, 157 F. Supp. 2d 509, 531 (E.D. Pa. 2001) (institutionalized adults challenge segregation at state facilities).

[14] *A.A. v. Board of Education*, 196 F. Supp. 2d 259 (E.D.N.Y., April 18, 2002) (page cites not indicated in decision), *Daigle v. Louisiana Dept. of Social Services*, 2002 WL 126647 (E. D. La. 2002), *Fetto v. Sergi*, 181 F. Supp. 2d at 57, *Parker v. Mich. Dept. of Corrections,* 2001 WL 1736637 (W.D. Mich. 2001), *Gregory v. Administrative Office of the Courts of New Jersey*, 168 F. Supp. 2d at 327, *Doe v. Sylvester*, 2001 WL 1064810 (D. Del.2001), *Frederick L. v. Dept of Public Welfare*, 157 F. Supp. 2d at 531.

[15] *A.A. v. Board of Education*, 196 F. Supp 259, *Gregory v. Administrative Office*, 168 F. Supp. 2d at 328 - 329, *Doe v. Sylvester*, 2001 WL 1736637, *Rowe v. Maine Dept. of Human Services*, 156 F. Supp. 2d 35.

the decision in *Walker*. For instance, in Illinois the Illinois Supreme Court has interpreted the State's sovereign immunity requirements as permitting an approach similar to *Ex Parte Young* authorizing suits against State officials when that official acted illegally in contravention of the Constitution or a duty imposed by law. *Nichol v. Stass*, 192 Ill. 2d 233, 238, 735 N.E.2d 582 (2000), *Senn Park Nursing Center v. Miller*, 104 Ill 2d 169, 188-89, 470 N.E. 2d 1029 (1984). The Court's decision in *Walker* establishes an obstacle in proceeding in state court under Title II. Indeed, the defendant has already asserted *Walker* as a bar for plaintiff to bring her ADA claims in state court in this case. (App. p. A-25).

To preclude the ability of a person adversely affected from obtaining relief under Title II of the ADA would permit states to disregard with impunity the provisions of that statutory provision and would contravene the legislative intent of the ADA. That intent was to provide disabled persons with a "full panoply of remedies" See H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 98 (1990); H.R. Rep. No 485, Pt. 3, 101st Cong., 2d Sess. 52 (1990). In 42 U.S.C. §12133 Congress expressly incorporated the remedies, procedures and rights set forth in the Rehabilitation Act, 29 U.S.C. §794(a)(2). The Rehabilitation Act had adopted the remedies of Title VI of the Civil Rights Act of 1964. 42 U.S.C. 2000d *et seq*. While the language of Title VI does not specifically provide for suit by a private individual against a recipient of federal funds, 42 U.S.C. §200d-7(a)(1) certainly implies one by providing that states shall not be immune from suit under the Eleventh Amendment of the Constitution of the United States for violations of Title VI and Section 504 of the Rehabilitation Act. The United States Supreme Court confirmed the right of private individuals to bring suit under the Civil Rights of 1964 in *Alexander v. Sandoval*, 532 U.S. 275, 280, 121 S.Ct. 1511 (2001). Similarly, courts have confirmed the right of private

individuals to bring suit against state officials in their officials under *Ex Parte Young* for violations of section 504 of the Rehabilitation Act. See, e.g., *Brennan v. Stewart*, 834 F.2d 1248, 1255 (5th Cir. 1988). Thus, it is properly presumed that Congress was aware of this state of the law when it drafted 42 U.S.C. §12133. See, *Bragdon v. Abbott*, 524 U.S. 624, 645 (1988). As the United States District Court for the District Court of Delaware has noted in response to whether *Ex Parte Young* applies to Title II actions for injunctive relief against state officials, Congress' explicit adoption of the remedies and rights set forth in Section 504, indicates its intention that suits under Title II under *Ex Parte Young* are appropriate. *Doe v. Sylvester*, 2001 WL 1064810 (D. Del. 2001). Accordingly for all of these reasons, plaintiff respectfully submits that this Court should reconsider its prior decision and determine that a suit against the Director of the Illinois Department of Public Aid under 42 U.S.C. §12132 is proper.

CONCLUSION

For all of the foregoing reasons, Donna Radaszewski, plaintiff-appellant in this case, respectfully requests this Court to reverse the decision of the court below entering judgment on the pleadings against her.

Respectfully submitted,

_____

One of plaintiff-appellant's attorneys

ATTORNEY'S CERTIFICATION UNDER RULES 32(a)(7)(B)

I certify as counsel for the plaintiff that this brief submitted in support of her appeal satisfies the type-volume limitation set forth in Federal Rule of Civil Procedure 32(a)(7)(B). Specifically, the brief contains 11,704 Words, exclusive of the Disclosure Statement, Table of Contents and the Table of Authorities.

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Circuit Rule 31(e)(1) Statement

The undersigned certifies that all of the materials required by Circuit Rule 31(e)(1) to be in the digital version of the Appellant's Brief and Appendix are included, with the exception of the following portions of the Appendix which are unavailable to the Appellant electronically:

-- No. 1: Docket Entries at A-2

-- No. 2: Memorandum Opinion and Order at A-5

-- No. 4: Excerpt from Defendant's Answer to Plaitiff's Supplemental Complaint for Injunctive Relief at A-25

-- No. 7: Hearing Decision from the Illinois Department of Public Aid, August 16, 2000, at A-40

_____
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APPENDIX

APPENDIX
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IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS

DONNA RADASZEWSKI, Guardian for Eric Radaszewski, on his behalf,	)	
Plaintiff,	)	
vs.	)	No. 00 CH 1475
JACKIE GARNER, Director, Illinois Department of Public Aid,	)	
Defendant.	)	

SUPPLEMENTAL COMPLAINT FOR INJUNCTIVE RELIEF

Plaintiff Donna Radaszewski, on behalf of her son and ward, Eric Radaszewki, states her Complaint against defendant Ann Patla, Director of the Illinois Department of Public Aid, as follows:

COUNT I: VIOLATION OF THE ILLINOIS ADMINISTRATIVE PROCEDURE ACT
5 ILCS 100/1 et seq. (As Original)

1 Plaintiff Donna Radaszewski is the guardian for her disabled adult son, Eric Radaszewski. She brings this action in her capacity as Eric's guardian on his behalf.

2. Plaintiff and Eric reside in DuPage County, Illinois.

3. Defendant Ann Patla is the Director of the Illinois Department of Public Aid (IDPA).

4. IDPA is the state agency charged with the administration of the Medicaid program in Illinois

5. Eric, born August 5, 1973, is 21 years old.

6. Eric is disabled and receives disability benefits under the federal Supplemental

Security Income program. He is eligible for Medicaid.

7. On February 11, 1992, Eric was diagnosed with medulloblastoma, a brain cancer.

8. On December 24, 1993, Eric suffered a mid-brain stroke after he had undergone surgery, radiation and chemotherapy as treatment for the cancer.

9. The disease, stroke and the subsequent treatment have left Eric with a very low level of body and mental functioning. He is highly medically fragile.

10. It is the opinion of Eric's physician that Eric requires private duty nursing services of a registered nurse, one-on-one, 24 hours per day in order to survive.

11. For the past five years, Eric received private duty nursing care at home by registered nurses 16 hours per day, with 336 additional hours per year of services from registered nurses to provide Eric's parents respite. The balance of his 24 hour per day care came from his parents, who were specially trained to provide the necessary services to avoid medical crisis for Eric.

12 This care was paid for by Medicaid.

13. The Medicaid program is a joint federal and state funded program enacted to provide necessary medical assistance to needy disabled persons and families with dependant children, whose income and resources are insufficient to meet the cost of care. 42 U.S.C. §1396, 305 ILCS 5/5-1.

14. Each State participating in the Medicaid program must submit a Medicaid plan to the Secretary of Health and Human Services (HHS) for approval. 42 U.S.C. §1396.

15. The plan must specify the amount, duration, and scope of each service that the state provides in its Medicaid program. 42 U.S.C. §§1396a(10), U.S.C. §1396d(a), 42 CFR §440.230(a).

16. Private duty nursing is a service that states may chose to include in their Medicaid plans. 42 U.S.C. §1396d(a)(8), 42 U.S.C. §1396a(a)(10)(C), 42 CFR §§440.225, 440.80.

17. Federal regulations define "private duty nursing" as nursing services provided to persons who require more individual and continuous care than is available from a visiting nurse or than is routinely provided by the nursing staff of a hospital or nursing facility. 42 CFR §440.80. Under the regulation, the state has the option to provide private duty nursing services in the recipient's home, at a hospital or at a skilled nursing facility. 42 CFR §440.80(c).

18. In addition to providing the Medicaid coverage described in their Medicaid plans, States have the option of requesting approval from HHS to provide home and community based care services for persons who would otherwise require institutional care that would be paid for by Medicaid. These services are provided under a range of Medicaid waiver programs that are authorized under 42 U.S.C. §§1396a(a)(10)(A)(ii)(VI), 1396n(b)-(e). Under this waiver authority, the Secretary of HHS may grant waivers of certain otherwise applicable Medicaid requirements, including for example financial eligibility requirements and service limitations. Id. 19. Illinois has submitted to HHS and obtained federal approval of its Medicaid plan.

20. The Illinois Medicaid plan includes broad coverage for private duty nursing, with the sole conditions that the private duty nursing is recommended by a physician, that prior approval from the State agency is sought, and that the nursing care not be provided by a relative. The plan includes no limitations as to cost or as to where these services must be provided. The sections of the Illinois Medicaid Plan relating to private duty nursing services, Exhibit A, are attached to and made a part of this Complaint.

21. Illinois also has expanded its Medicaid program by including several home and

community based care Medicaid waiver programs approved by the Secretary of HHS.

22. Under the Home Services waiver program ("HSP"), Illinois provides services that are not otherwise covered under the Medicaid program, including personal care and homemaker services, to enable disabled adults to remain in their home. The cost of services which may be provided to recipients under this waiver program is limited, however, to the average Medicaid cost of care for persons in skilled nursing facilities.

24. Despite the language of the Illinois Medicaid plan covering private duty nursing with only the limitations described in paragraph 20, above, it is Defendant's unwritten policy to impose additional restrictions that eliminate private duty nursing for persons aged 21 or older and instead provide such services only through the HSP, its limited home and community based Medicaid waiver program.

25. As Eric's 21st birthday approached, state officials advised Eric's mother to contact the Office of Rehabilitation Services ("ORS") to apply for the HSP as the sole avenue to obtain continued private duty nursing services for Eric.

26. On February 18, 2000, ORS issued a decision limiting Eric's eligibility for HSP services to a "service cost maximum" of $4,593 per month.

27. This service cost maximum amount reduced funding for Eric's private duty nursing services to the equivalent of five hours per day.

28. Plaintiff filed an administrative appeal on the ORS decision limiting Eric's services under the HSP to $4,593 per month, and an administrative hearing was held on July 25, 2000.

29. At this hearing, Eric's treating physician, Janina Badowska, M..D. testified that it in

her medical opinion, Eric requires 24 hour one-on-one skilled nursing care from registered nurses and that the level of care offered by the ORS service cost maximum would leave Eric at great medical risk. She further testified that Eric's needs could not be met by staffing levels at a skilled nursing facility.

30. On August 18, 2000, Defendant Ann Patla, as Director of IDPA, issued an administrative decision, affirming the ORS decision limiting funding of Eric's services under the Home Services Program to $4,593 per month, despite a finding of fact in the decision that placing Eric in a nursing facility would place Eric at risk of danger.

31. Under the Illinois Administrative Procedure Act, 5 ILCS 100/1-70, each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy is a "rule" within the meaning of the Act.

32. Defendant's unwritten policy limiting Medicaid coverage for private duty nursing services for adults to the services provided under the HSP waiver program is a rule of general applicability within the meaning of 5 ILCS 100/1-70.

33. Under 5 ILCS 100/5-40, state agencies must adopt rules pursuant to the notice and comment rulemaking procedure specified in the provision.

34. Because Defendant has not followed the notice and comment rule-making procedure set out in 5 ILCS 100/5-40 for the unwritten policy limiting Medicaid coverage for private duty nursing services for adults to the services provided under the HSP waiver program, the policy is invalid under the Illinois Administrative Procedure Act.

35. Eric will suffer irreparable injury if Defendant is not enjoined from applying this invalid rule to deny Eric the full amount and scope of private duty nursing services described in

the Illinois Medicaid plan.

36. Eric has no adequate remedy at law.

37. Eric is indigent and unable to post bond.

WHEREFORE, plaintiff respectfully prays for the following relief:

A. That this Court enter, without a requirement of a bond, a temporary restraining order, preliminary injunction and permanent injunction enjoining Defendant from applying the invalid limitation on the amount and scope of private duty nursing services available under the Illinois Medicaid plan.

B. Such other and further relief as the Court deems equitable and just.

COUNT II: VIOLATION OF THE MEDICAID PLAN (As Original)

1. - 30. Plaintiff re-alleges paragraphs one through thirty of Count I as paragraphs one through thirty of Count II.

31. The Illinois Public Aid Code directs IDPA to establish standards and rules to determine the amount and nature of medical services to be included in the Medicaid program, including private duty nursing services. 305 ILCS 5/5-4, 5-5.

32. The Illinois Medicaid plan sets out such standards and rules.

33. Defendant has violated the Illinois Medicaid plan by failing to provide Eric the full, amount, duration and scope of private duty nursing services set out in the Illinois Medicaid plan.

34. Eric will suffer irreparable injury if Defendant is not enjoined from failing to afford Eric the full amount and scope of private duty nursing services described in the Illinois Medicaid plan.

35. Eric has no adequate remedy at law.

36. Eric is indigent and unable to post bond.

WHEREFORE, plaintiff respectfully prays for the following relief:

A. That this Court enter, without a requirement of a bond, a temporary restraining order, preliminary injunction and permanent injunction enjoining Defendant from failing to afford Eric the full amount, duration and scope of private duty nursing services covered in the Illinois Medicaid plan.

B. Such other and further relief as this Court deems equitable and just.

COUNT III: VIOLATION OF 89 ILL.ADM CODE §140.435 (As Original)

1. - 30. Plaintiff re-alleges paragraphs one through thirty of Count I as paragraphs one through thirty of Count III.

31. The Illinois Public Aid Code directs IDPA to establish standards and rules to determine the amount and nature of medical services to be included in the Medicaid program, including private duty nursing services. 305 ILCS 5/5-4, 5-5.

32. The Department's rule at 89 Ill.Adm.Code §140.435(b)(2),provides that Medicaid payment "shall be made" for private duty nursing services.

33. Defendant's refusal to cover medically necessary private duty nursing services for Eric violates 89 Ill.Adm.Code §140.435(b)(2).

34. Eric has no adequate remedy at law.

35. Eric is indigent and unable to post bond.

WHEREFORE, plaintiff respectfully prays for the following relief:

A. That this Court enter, without a requirement of a bond, a temporary restraining order, preliminary injunction and permanent injunction enjoining Defendant from

failing to provide payment for Eric's medically necessary private duty nursing services.

B. Such other and further relief as this Court deems equitable and just.

COUNT IV: BREACH OF CONTRACT (As Original)

1. - 30. Plaintiff re-alleges paragraphs one through thirty of Count I as paragraphs one through thirty of Count IV.

31. The Illinois Medicaid plan is a contract between the Illinois Department of Public Aid and the federal government.

32. Medicaid recipients, including Eric, are the clearly intended and direct beneficiaries of this contract.

33. By failing to afford Eric the full amount, duration, and scope of private duty nursing included in the Illinois Medicaid Plan, defendant is in breach of contract.

34. Defendant's decision to restrict Eric's nursing services to the cost maximum of the Home Services Program thereby denying him the benefit of the private duty nursing services described in the Illinois Medicaid plan has injured Eric.

35. Eric has no adequate remedy at law and requires specific performance of the terms of the Medicaid plan in order to obtain relief.

WHEREFORE, plaintiff respectfully prays for the following relief:

A. That this Court enter, without the requirement of a bond, a temporary restraining order and preliminary injunction enjoining Defendant from failing to afford Eric the full amount, duration and scope of private duty nursing services covered in the Illinois Medicaid plan.

B. That this Court award plaintiff specific performance of the Illinois Medicaid plan provisions and afford Eric the full amount, duration of scope of private duty nursing services covered in the Plan.

C. Such other and further relief as this Court deems equitable and just.

COUNT V: VIOLATION OF THE ILLINOIS ADMINISTRATIVE PROCEDURE ACT

1. - 24. Plaintiff realleges paragraphs one and two, four, six through eighteen, twenty-one and twenty-two, and twenty five through thirty of Count I as paragraphs one through twenty-four of Count V.

25. In March 2001 Jackie Garner replaced defendant Ann Patla as Director of the Illinois Department of Public Aid and endorses all of the actions taken by Ms. Patla relevant to this lawsuit.

26. Eric Radaszewski was born on August 5, 1979.

27. In August, 2000, when Eric turned 21 years old, Illinois' Medicaid plan, as submitted to HHS, included coverage for private duty nursing, with the sole conditions that private duty nursing services be recommended by a physician, that prior approval from the State agency be sought, and that the nursing care not be provided by a relative. A copy of that provision as it existed at that time is attached to this Complaint as Exhibit A.

28. Despite the language of the Illinois State plan covering private duty nursing with the sole limitations described in paragraph 28, above, it was the unwritten policy of the State to impose additional restrictions that eliminate private duty nursing for persons aged 21 or older and instead provide such services only through the HSP, its limited home and community based Medicaid waiver program.

29. On September 1, 2000, plaintiff brought an action in the United States District Court for the Northern District of Illinois against Defendant Patla, seeking to enjoin defendant's reduction of Eric's nursing services. Plaintiff claimed that defendant's actions, deviating from its Medicaid plan, violated the federal Medicaid statute, its implementing regulations and the requirements of due process.

30. The District Court denied plaintiff's motion for a preliminary injunction, and plaintiff appealed that interlocutory order.

31. On December 1, 2000, plaintiff filed the present case, bringing claims founded on state law that could not be included in the federal law suit. Plaintiffs claims, set out as Counts I-IV, included that defendant's unwritten policy to deny Eric private duty nursing violated the notice and comment requirements of the Illinois Administrative Procedure Act, 5 ILCS 100/1 et seq., the requirements set out in its Medicaid plan, and 89 Ill.Adm.Code 140.435(b), and deprived Eric of his rights as a third party beneficiary of the contract between the Department and the federal government.

32. On December 19, 2001, this Court entered an Order denying Defendant's Motion to Dismiss and issued a Temporary Restraining Order enjoining Defendant from reducing Eric's nursing services pending further order.

33. On January 3, 2000, without prior notice to either this Court or to the Seventh Circuit Court of Appeals, the plaintiff or the public, the Department submitted to HHS an amendment to the Illinois Medicaid plan, deleting coverage for private duty nursing services for adults. On February 2, 2001, HHS approved the amendment.

34. On March 16, 2001, IDPA published in the Illinois Register a proposed rule to

amend 89 Ill.Adm.Code §140.435 and §140.436 to delete Medicaid coverage for private duty nursing services. The "Complete Description of the Subjects and Issues Involved" section of the notice of rulemaking stated that the changes "are being made as clarifications...."

35. On May 23, 2001, pursuant to public request, the Department conducted a hearing on the proposed rules.

36. On July 23, 2001, the Department submitted to the Joint Committee on Administrative Rules ("JCAR") its Second Notice of Proposed Rulemaking for the proposed amendment.

37. In the section of the Second Notice describing the public comments objecting to the deletion of Medicaid coverage for private duty nursing services for adults, the Department claimed that "the comments received were not related to the rules, or their intended purpose or potential effect" and that the "proposed amendments do not change the Department's policy on coverage for home health services for adults." Exhibit B, Second Notice of Proposed Rulemaking, page 8.

38. On August 7, 2001, JCAR reviewed the rules without objection.

39. On September 1, 2001, the Department filed a certified copy of the amended rules with the office of the Secretary of State.

40. Under the Illinois Administrative Procedure Act, 5 ILCS 100/1-70 each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy is a rule within the meaning of the Act.

41. Under 5 ILCS 100/5-40, state agencies must adopt rules pursuant to the notice and comment rule making procedure specified in the provision. Among these requirements, an

agency must include in the first notice of rule making a "complete description of the subjects and issues involved." 5 ILCS 100/5-40(b)(3). During the notice period, the agency must accept from interested persons data, views, arguments or comments and it must "consider all submissions received." 5 ILCS 100/5-40(b).

42. In promulgating the amendments to 89 Ill.Adm.Code §140.435 and §140.436, defendant has not followed the letter or the spirit of the requirements set out in 5 ILCS 100/5-40(b). The Department refused to consider the comments of the public on the decision to delete Medicaid coverage for private duty nursing services, having deemed the comments not pertinent to the purpose of the rule making. The Department's Notice of Proposed Rule Making did not include a complete description of the subjects and issues involved, failing to disclose that it was implementing a policy to delete Medicaid coverage for private duty nursing services for adults or the reasons for not covering those services.

43. Eric will suffer irreparable injury if Defendant is not enjoined from applying its invalid rules to deny Eric the full amount and scope of private duty nursing services he has been receiving under the former Illinois Medicaid plan.

44. Eric has no adequate remedy at law.

45. Eric is indigent and unable to post bond.

WHEREFORE, plaintiff respectfully prays for the following relief:

A. That this Court enter, without a requirement of a bond, a temporary restraining order, preliminary injunction and permanent injunction enjoining Defendant from reducing Eric's nursing services pursuant to the invalid amendment to 89 Ill.Adm.Code §140.435 or §140.436.

B. Such other and further relief as the Court deems equitable and just.

COUNT VI: VIOLATION OF THE AMERICANS WITH DISABILITIES ACT: 42 USC §12132 and 28 CFR §35.130.

1. - 39. Plaintiff re-alleges paragraphs one through thirty-nine of Count V as paragraphs one through thirty-nine of Count VI.

40. Under the Department's policy, Eric may receive Medicaid payment for necessary long term care services in institutions, meaning skilled nursing facilities and hospitals, but not at home.

41. In-home nursing care is the most integrated setting for services for Eric, and is at least as cost-effective as treatment he would receive in an institution.

42. Under Title II of the Americans with Disabilities Act, 42 USC §12132 and its implementing regulations at 28 CFR §35.130, public entities must provide services to persons with disabilities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

43. Eric is a qualified individual with a disability within the meaning of Title II of the ADA.

44. The Illinois Department of Public Aid of which defendant Patla is Director is a public entity" within the meaning of Title II of the ADA.

45. The Department's failure to provide Eric Medicaid services for Eric in his home, the most integrated setting for receipt of those services, violates the community integration requirements of Title II of the American with Disabilities Act, 42 USC §12132 and its implementing regulation 28 CFR §35.130.

46. Eric will suffer irreparable injury if Defendant is not enjoined from reducing his Medicaid covered nursing services at home forcing him into an institution where his health will be in imminent danger and he will be segregated from his family and the larger community.

47. Eric has no adequate remedy at law.

48. Eric is indigent and unable to post bond.

WHEREFORE, plaintiff respectfully prays for the following relief:

A. That this Court enter, without a requirement of a bond, a temporary restraining order, preliminary injunction and permanent injunction enjoining Defendant from failing to afford Eric continued nursing services at home rather than in an institution.

B. Such other and further relief as this Court deems equitable and just.

COUNT VII: VIOLATION OF SECTION 504 OF REHABILITATION ACT OF 1973: 29 USC §794 and 28 CFR 41.51(d)

1. - 41. Plaintiff re-alleges paragraphs one through forty-one of Count VI as paragraphs one through forty-one of Count VII.

42. Section 504 of the Rehabilitation Act of 1973 ("Section 504") prohibits discrimination against people with disabilities on the basis of their disabilities in programs and services that receive federal financial assistance. 29 USC §794.

43. Section 504 requires that services must be provided in the most integrated setting appropriate to the needs of individuals with disabilities. 28 CFR §41.51(d).

44. The Department's failure to provide Medicaid services for Eric in his home, the most integrated setting for receipt of those services, even though it will provide Medicaid services in institutions for Eric, violates Section 504.

45. Eric will suffer irreparable injury if Defendant is not enjoined from reducing his Medicaid covered nursing services he currently receives at home, forcing him into an institution where his health will be in imminent danger, and he will be segregated from his family and the larger community.

46. Eric has no adequate remedy at law.

47. Eric is indigent and unable to post bond.

WHEREFORE, plaintiff respectfully prays for the following relief:

A. That this Court enter, without a requirement of a bond, a temporary restraining order, preliminary injunction and permanent injunction enjoining Defendant from failing to afford Eric continued nursing services at home rather than in an institution.

B. Such other and further relief as this Court deems equitable and just.

Respectfully submitted,

_____

Eliot Abarbanel
One of the Attorneys for Plaintiff

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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
	)	Judge John W. Darrah
JACKIE GARNER, Director, Illinois Department of Public Aid,	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR REMAND

Statement of Facts

This is the second time this case has reached federal court. On September 1, 2000 Donna Radaszewski, the mother of Eric Radaszewski, filed suit in the United States District Court for the Northern District of Illinois seeking declaratory and injunctive relief on his behalf. Eric is presently 22 years of age and is extremely medically fragile suffering from a number of medical conditions that resulted from his enduring brain cancer in 1992 and suffering a mid-brain stroke in 1993. Since those medical events, Eric has required constant, round-the-clock, private duty nursing services without which he will likely die.

Until he reached the age of 21 on August 5, 2000, the defendant's[16] agency, the Illinois Department of Public Aid, ("IDPA") provided funding for 16 hours a day of private duty nursing

[16] The term "defendant" refers to Jackie Garner, the present Director of the Illinois Department of Public Aid. At the time this suit was filed the Director was Ann Patla. Pursuant to Rule 25(d)(1), Ms. Garner was automatically substituted for Ms. Patla and the term includes the actions of each.

in Eric's home under the federal Medicaid program. As defendant has acknowledged, Eric would be in danger if he were placed in a nursing home because a nursing home's staffing could not provide the level of care that he requires. Through a combination of Medicaid assistance and their own efforts, Eric's parents were able to provide him with the necessary medical services. In August 2000 when Eric reached the age of 21, IDPA reduced its reimbursement to the equivalent of five hours a day of private duty nursing. This created a medical crisis for Eric and his family.

On September 1, 2000, suit was brought claiming that defendant's act of reducing Eric's private duty nursing violated specific provisions of the federal Medicaid statute, 42 U.S.C. §1396 et seq., and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Ms. Radaszewski sought a temporary restraining order which was granted on September 1, 2000. From the outset, defendant's defense to this lawsuit was that this case did not belong in federal court. Defendant argued that Ms. Radaszewski possessed no private right of action under 42 U.S.C §1983 to challenge alleged violations of provisions of the Medicaid statute or the United States Constitution.

When the district court denied Ms. Radaszewski's motion for a preliminary injunction on November 16, 2000, based upon defendant's section 1983 argument and the Court of Appeals for the Seventh Circuit denied her motion for an injunction pending appeal, Ms. Radaszewski brought the present suit in the Circuit Court of the Eighteenth Judicial Circuit in DuPage County, Illinois, seeking an injunction to maintain the level of private duty nursing at 16 hours a day. The DuPage suit was based solely on claims made under Illinois law: that defendant had violated provisions of the Illinois Administrative Procedures Act, 5 ILCS 100/1 *et seq.*, its State Medicaid Plan, Illinois Regulation 89 Ill.Adm.Code §140.35 regarding private duty nursing, and that Eric

was the intended beneficiary of the Illinois Medicaid Plan, a contract which was breached when IDPA reduced Eric's hours of medical assistance from 16 to five hours a day. The circuit court granted Ms. Radaszewski's motion for a temporary restraining order on December 19, 2000, reestablishing Eric's hours of private duty nursing to a level of 16 hours a day. That injunction is presently in effect.

On September 7, 2001, defendant filed in state court a motion to vacate the temporary restraining order and dismiss the case as moot. Defendant argued that her act of promulgating a new rule abolishing private duty nursing for all persons over 21 mooted each of plaintiff's claims made under state law. In response to defendant's motion, Ms. Radaszewski filed on October 15, 2001, a Motion to Extend the Temporary Restraining Order, a Memorandum in Support of Motion to Extend Temporary Restraining Order and in Opposition to Defendant's Motion to Vacate and Dismiss, and a Supplemental Complaint for Injunctive Relief attached hereto as Attachment A. The Supplemental Complaint repeated the four counts of the original complaint filed in December 2000 and added three new counts: a count alleging an additional violation of the Illinois Administrative Procedure Act; a count alleging violation of 42 U.S.C. §12132, Title II of The Americans with Disabilities Act and its implementing regulation, 28 CFR §35.130 (ADA); and a count alleging a violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 and its implementing regulation, 28 CFR §41.51(d) (Rehabilitation Act).

On November 8, 2001, defendant filed a reply memorandum in support of its pending motion to vacate and dismiss (attached hereto as Attachment B). In that memorandum defendant argued that with respect to Ms. Radaszewski's new count pertaining to the Illinois Administrative Procedure Act that the court had not yet granted plaintiff leave to file its

Supplemental Complaint and that on the merits plaintiff's arguments regarding the state statute were not supportable. (Attachment B at pp. 2 - 7) As to the Supplemental Complaint's counts regarding the ADA and the Rehabilitation Act, defendant in its reply argued only that leave to file the Supplemental Complaint had not been granted and made no arguments regarding the merits. However, on November 14, 2001, defendant filed an additional memorandum entitled, "Defendant's Objections to Plaintiff's Motion for Leave to File Supplemental Complaint and to Extend Temporary Restraining Order." (Attached as Attachment C). In that memorandum defendant argued that if leave to file the Supplemental Complaint was granted, then it objected to extending the injunction and proceeded to argue on the merits the inapplicability of the ADA and the Rehabilitation Act and the application of the Eleventh Amendment as a bar to these claims. (Attachment C, at pages 3 - 6).

On November 15, 2001, the DuPage County Circuit Court granted plaintiff leave to file its supplemental complaint, extended the temporary restraining order, and found that plaintiff had a probability of success on the merits of her claims. (See Attachment D). On December 10, 2001, defendant filed her answer to plaintiff's Supplemental Complaint. (See Attachment E.) In that answer defendant alleged several affirmative defenses, including that plaintiff's count regarding the ADA was barred by the Eleventh Amendment and could not be brought against defendant Director of IDPA. On December 14, 2001, defendant filed a Notice of Removal of the state court case to this Court. Ms. Radaszewski has moved on January 14, 2002, pursuant to 42 U.S.C. §1447(c) that this case be remanded to the state court.

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS

DONNA RADASZEWSKI, Guardian for Eric Radaszewski, on his behalf,	)	
Plaintiff,	)	
vs.	)	No. 00 CH 1475
JACKIE GARNER, Director, Illinois Department of Public Aid,	)	
Defendant.	)	

AFFIDAVIT

I, Donna Radaszewski, having been duly sworn under oath, state as follows:

1. I am the mother and plenary guardian of Eric Radaszewski.

2. I have been actively involved in the care and treatment of Eric since he first developed severe medical problems in 1992.

3. I and my husband, Lester Radaszewski, provide a loving and caring home environment for Eric. He has known no other home during his entire life.

4. We provide a clean and healthy environment for Eric, changing his clothes and bed sheets daily.

5. We make special foods that we know Eric likes and can tolerate, such as waffles, pancakes, and hamburgers.

6. I cut his hair, finger nails, and toe nails at least once a week.

7. Eric is very dependent on my husband and me for emotional and psychological support.

8. My husband and I talk with Eric, watch television with him, and play various games with him. Eric enjoys watching sporting events with my husband and also enjoys doing puzzles with both of us.

9. We assist in his education by doing homework with him. Since he can't read, we often read his homework materials to him and he is able to answer the questions. I work with him on his reading and math.

10. My husband often rough houses with Eric, which promotes an emotional attachment with him.

11. Many of our conversations serve to alleviate Eric's anxieties about his medical and physical condition. We talk about how he got the way he is and what he can expect in the future.

12. Eric gets depressed when he is away from us for any period of time. For example, I was recently hospitalized for several days. Eric became very depressed during that period.

13. When we're gone from the house, even for brief periods, Eric constantly asks when we will return.

14. Eric has episodes of dementia; we provide positive reinforcement of where and who he is.

15. We also attempt to foster his self-sufficiency by requiring him to perform as many tasks as we think he is capable of.

The foregoing is true and accurate to the best of my knowledge and belief, and I would so testify if called upon to do so in a court of law.

_____
Donna Radaszewski

SUBSCRIBED AND SWORN to
before me this day
of , 2001.

_____
NOTARY PUBLIC

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS

DONNA RADASZEWSKI, Guardian for Eric Radaszewski, on his behalf,	)	
Plaintiff,	)	
vs.	)	No. 00 CH 1475
JACKIE GARNER, Director, Illinois Department of Public Aid,	)	
Defendant.	)	

AFFIDAVIT

I, Paul Wibbenmeyer, having been duly sworn under oath, state as follows:

1. I am a registered nurse.

2. I have been involved in Eric Radaszewski's care since May 1992.

3. I am the lead nurse and coordinate the care and treatment of Eric by the various nurses working for the Radaszewskis. I have been Eric's lead nurse since May 1992.

4. I have had extensive training and experience in treating severely disabled patients such as Eric.

5. Since Dr. Badowska's report in her affidavit of August 31, 2000, Eric's condition remains the same. Eric continues to experience all the medical conditions which are described in Dr. Badowska's affidavit. In addition, he continues to require all the nursing services described in Dr. Badowska's affidavit of August 31, 2000.

6. Fortunately, due to the excellent nursing care received by Eric during the past year, his

condition has not deteriorated.

7. Given the technological complexity, skill, and judgment required to administer these multiple skilled nursing tasks, it is inconceivable that his care could be handled by anyone other than a fully licensed registered nurse on a one-to-one basis.

8. He is at risk of exacerbation of his chronic health problems and they could escalate to acute life threatening problems.

9. All these multiple health problems require the continuous monitoring by someone with the training and education of a registered nurse.

10. It is important to Eric's care and progress that he remain in his home, where he is comfortable and oriented. He receives consistent care in the home from the same nurses, with very little turnover of staff.

11. His parents are his anchors. Their constant presence contributes greatly to his quality of life. He is very dependent on them. Without their presence, he would be more confused, scared, and frightened. He has not been away from his parents in his entire life.

12. In my opinion, Eric's condition would markedly deteriorate if he were placed in an institution away from his parents and without the constancy of care that he receives at home.

13. Also, by remaining at home, Eric is able to participate in several educational activities. He attends the College of DuPage with the assistance of a registered nurse for independent learning activities. These activities would not be possible without the constant presence of a registered nurse.

The foregoing is true and accurate to the best of my knowledge and belief, and I would so testify if called upon to do so in a court of law.

_____
Paul Wibbenmeyer, R.N.

SUBSCRIBED AND SWORN to
before me this day
of , 2001.

_____
NOTARY PUBLIC

Circuit Rule 30(d) Statement

The undersigned hereby certifies that all of the materials required by Circuit Rules 30(a) & 30(b) are included in this Appendix.

_____
Eliot Abarbanel
One of Plaintiff's Attorneys

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