99-7572(L)

99-7586 (CON)
99-7588 (CON)
99-7604 (CON)
99-7618 (CON)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JUANA RODRIGUEZ, by her son and next friend, Wilfredo Rodriguez; AMELIA RUSSO; MARY WEINBLAD, by her daughter and next friend, Susan Downes; CHRISTOS GOUVATSOS; and SIDONIE BENNETT, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

MOLLIE PECKMAN, by her son and next friend, Alex Peckman,

Intervenor-Plaintiff-Appellee,

v.

CITY OF NY, IRENE LAPIDEZ, Commissioner Nassau County Department of Social Services, COMMISSIONER OF THE WESTCHESTER COUNTY DEPARTMENT OF SOCIAL SERVICES, NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES, COMMISSIONER, SUFFOLK COUNTY DEPARTMENT OF SOCIAL SERVICES, THE NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES,

Intervenors-Defendants-Appellants,

DENNIS WHALEN, Commissioner of the New York State Department of Health, BRIAN WING, Commissioner of the New York State Office of Temporary Disability Assistance,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR MUNICIPAL-INTERVENOR DEFENDANT-APPELLANT

SAA

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UNITED STATES COURT OF APPEALS
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JUANA RODRIGUEZ, by her son and next friend, Wilfredo Rodriguez, AMELIA RUSSO; MARY WEINBLAD, by her daughter and next friend, Susan Downes, CHRISTOS GOUVATSOS, SIDONIE BENNETT, individually and on the behalf of all others similarly situated,

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CITY OF NEW YORK, IRENE LAPIDEZ, Commissioner Nassau County Department of Social Services, COMMISSIONER OF THE WESTCHESTER COUNTY DEPARTMENT OF SOCIAL SERVICES, NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES, COMMISSIONER, SUFFOLK COUNTY DEPARTMENT OF SOCIAL SERVICES, THE NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES,

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DENNIS WHALEN, Commissioner of the New York State Department of Health, BRIAN WING, Commissioner of the New York State Office of Temporary Disabiity Assistance,

Defendants-Appellants.

MUNICIPAL APPELLANT'S BRIEF

PRELIMINARY STATEMENT

In this class action, commenced in the United States District Court for the Southern District, plaintiffs Juana Rodriguez, Mary Weinblad, Christos Gouvatsos, Sidonie Bennett, and intervenor-plaintiff Mollie Peckman (jointly "plaintiffs") seek a

permanent injunction requiring, *inter alia*, that defendants Dennis Whalen, Commissioner of the New York State Department of Health and Brian Wing, Commissioner of the New York State Office of Temprary Disablity Assistance, and by intervenor-defendants City of New York ("the City"), the Commissioner of the Westchester County Department of Social Services, the Commissioner of Suffolk County Department of Social Services, and Irene Lapidez, the Commissioner of the Nassau County Department of Social Services (jointly "defendants") provide safety monitoring, as an independent task, as part of the personal care services program under Medicaid.

Defendants appeal from an opinion and order of the United States District Court for the Southern District (Scheindlin, U.S.D.J), dated April 19, 1999, and a judgment of that court entered May 13, 1999, granting plaintiffs' motion for a permanent injunction requiring defendants to include safety monitoring as a separate task among the tasks constituting the State's personal care services program under Medicaid.

QUESTIONS PRESENTED

1. Given this Court' unequivocal holding that the Americans With Disabilities Act ("ADA") does not address discrepancies between services directed at different categories of disabled individuals. do plaintiffs, who charge that cognitively impaired Medicaid recipeints do not have the same access to personal care services as physically impaired recipients, fail to state a cognizable discrimination claim under the ADA?

2. Would requiring defendants to offer safety monitoring as an indepandent task within the personal care services program, which would make the program available to individuals whose suffer solely from mental impairment, alter the fundamental nature of that program, which was intended to provide for the daily needs of the physically homebound?

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Notice of appeal for appellant City of New York was filed on May 20, 1999. Federal subject matter jurisdiction is conferred by 28 USC § 1343 in that appellees state claims pursuant to 42 USC § 1983. Appellate jurisdiction is conferred by 28 USC § 1292(a)(1).

STATEMENT OF FACTS

A. Personal care services.

The issues in this case relate to the personal care services provided under the State Medicaid plan. "Personal care services" means partial or total assistance with personal hygiene, dressing and feeding; nutritional and environmental support functions; and health-related tasks. Such services may be provided to clients in their homes under the following conditions: (1) the tasks to be performed must be medically necessary to maintain the client's health and safety; (2) they must be ordered, initially, by an attending physician; (3) they must be based on an assessment of the client's needs and of the appropriateness and cost effectiveness of the services; (4) they must be provided by a

qualified person in accordance with a plan of care; (5) they must be supervised by a registered professional nurse; and (6) if they are required for more than 60 continuous days, they must be provided in accordance with certain fiscal assessment procedures (A165-66).[1] *See generally* 18 NYCRR § 505.14(a)(1), *et seq.*

Recipients of home care services must be medically stable. 18 NYCRR § 505.14(a)(4)(i). In most cases, recipients are simply elderly, frail, and live alone, and thus need some assistance. Individuals who are medically unstable would not typically receive home care services, as they would require a higher level of care than a home attendant could provide, *i.e.*, skilled nursing care provided by a certified home health agency, private duty nursing care, or the equivalent services in an institutional setting (i.e. nursing homes) (A166).

Recipients of home care services must also be self-directing, which means they are capable of making choices about their activities of daily living, understanding the impact of the choice and assuming responsibility for the results of the choice. 18 NYCRR § 505.14(a)(4)(ii). Generally, individuals who are nonself-directing and require continuous supervision and direction, are not qualified to receive home care services. However, exceptions can be made for nonself-directing individuals where the responsibility for making choices about the activities of daily living are assumed by another self-directing individual or outside

[1] Numbers in parentheses preceded by letter "A" refer to pages of the Appendix.

agency, who has substantial daily contact. 18 NYCRR § 505.14(a)(4)(ii)(a)-(c) (A166).

While the tasks performed for any particular client must be medically necessary, the actual number of hours of care allotted vary by individual, based upon the type and number of medically necessary tasks which must be provided. 18 NYCRR § 505.14(a)(6) The hours of care provided ("service hours") can vary anywhere from several hours per day to an enhanced level of service called continuous 24-hour personal care services, or split-shift care, where two home attendants work 12-hour shifts in the recipient's home. 18 NYCRR § 505.14(a)(3) (A167).

In the City, personal care services are provided by the City of New York Human Resourses Administration's ("HRA") Home Care Services Program (A163). In determining the level of care a client will receive, the HCSP considers two different types of assistance which may be needed by a client: "some assistance" or "total assistance." Under State regulations, "some assistance" means that "a specific function or task is performed and completed by the patient with help from another individual." 18 NYCRR § 505.14(a)(2)(i). "Total assistance" means that "a specific function or task is performed and completed for the patient." 18 NYCRR § 505.14(a)(2)(ii) (A167).

In addition, the HCSP also provides an enhanced level of service called "continuous, 24-hour personal care services." This level of service is defined as "uninterrupted care, by more than one person, for a patient who, because of his/her medical condition and disabilities, requires total assistance with toileting and/or

walking and/or transferring and/or feeding at unscheduled times during the day or night." 18 NYCRR § 505.14(a)(3). With this level of service (also known as "split-shift" or "multi-shift" care), a home attendant is assigned to work a 12-hour shift, after which that attendant would be relieved by another attendant who would work the following 12-hour shift. (In certain circumstances, split-shift care can also be provided in three 8-hour shifts). An example of a client needing split-shift care would be someone who has neuromuscular disease, or multiple sclerosis, who has no bed mobility and who needs to be turned and repositioned at frequent intervals to avoid developing pressure sores (A168-69).

The process of determining home care eligibility begins when a treating physician sends a request form to the HCSP. This request form, which is prepared by the physician, is called a "Medical Request for Home Care" form, or an "M-11q" (A169). While the treating physician submits the initial application for home care services, the level of services appropriate in a particular case is ultimately determined by a Medical Review Team ("MRT"), composed of medical social workers and/or registered nurses, which evaluates the information on the M-11q, as well as information on other assessment forms to arrive at an individualized assessment. It should be noted that while State regulations only require that home care services be approved by the staff of the local social services department, 18 NYCRR §§ 505.14(b)(1) and 501.3(a), it is the policy of the HCSP to utilize a more comprehensive process than that which is mandated, the heart of which is the MRT. Further information than that provided in the M-11q is routinely sought in

considering an application for home care services, and, under appropriate circumstances, a physician may even be sent to observe the prospective client in his or her home (A169-70).

After the M-11q has been received by HCSP, appropriately trained persons are then sent to the individual's home to perform an individual social assessment and an independent nursing assessment (A170). Specifically, a nurse will assess the individual in his or her home to delineate and better understand the tasks needed to be performed for the individual, including an assessment of the individual's own ability (or lack of ability) to perform those tasks (A170).

Following review of the physician's request form (M-11q) and a visit with the proposed recipient, the nurse completes the Nurse's Assessment Visit Report" (M-27r) indicating the functions and tasks required by the individual, and determining the degree of assistance required for each function and task. Finally, the nurse will develop a plan of care in collaboration with the individual or his or her representative. The nurse is the ideal person to perform this particular task, as nurses, unlike most treating physicians, are specifically trained in making functional evaluations and recommendations of this sort (A170).

An HCSP case worker will also assess the individual at home, but will utilize a "social" perspective. For example, the case worker will, among other things, determine if there are relatives or friends available that have been contributing to the care of the individual. The social assessment includes a discussion with the individual to determine how aware the

individual is of his or her circumstances, and whether or not the individual has any preferences concerning his or her care. 18 NYCRR § 505.14 (b)(3)(ii)(a). As part of the social assessment process, the case worker prepares a "Home Care Social Assessment" form (or "M-11s") (A170-71).

Once the categories of information have been assembled -- medical, nursing, and social -- the material are sent to the MRT for analysis. During this stage of the evaluation process, the members of the MRT always have the option of seeking clarifying, or additional, information to assist them in reaching their decision as to the proper level of home care services. As part of the process of medical review, and under appropriate circumstances, HCSP may arrange to have "affiliation physicians" (employed under an affiliation contract with the Medicaid program's Office of Home Care Services) sent to the individual's home to better evaluate the individual's home care needs (A171).

HCSP's TBA plan is merely an extension of the techniques already being used in HCSP's Cluster Care Program (A174). Under the TBA plan, as in Cluster Care, service will be provided in multiple daily service visits, where appropriate, rather than the unnecessary and costly previous practice of assigning workers to be present during periods when there are no specific tasks to be performed (A175).

As in Cluster Care, the number of service hours authorized and reauthorized under TBA will be determined based not upon the frequently non-productive blocks of time that the home attendant used to have to spend in the recipient's home, but upon

the number and type of medically necessary tasks recipients must have performed for them; hence the term task-based assessment. Under TBA, the number of service hours will be determined by the length of time normally required to perform such tasks (A175-76).

HCSP uses the following assessment instruments in TBA: (1) the M-11q (medical assessment); (2) the M-11s (social assessment); and (3) the M-27r (nurse's assessment) (A176). Not all proposed and current recipients of home care services will be subjected to a TBA service plan. For example, proposed and current recipients who qualify for 24-hour sleep-in or split-shift care will continue to be assessed and authorized as they have been in the past, and, thus, receives a traditional service plan (A176).

In addition, although the City has found through years of experience with cluster care clients that the standard task times meet the requirements of most of the clients, there are clients whose specific condition requires adjustments in the standard task times. For example, the very obese client might require adjustment of task times for bathing assistance and the depressed client may require additional time for the home attendant to encourage food intake. The essence of the task based care plan is the individualization of each plan to meet the specific health and safety needs of each client (A176).

Furthermore, after the individualized TBA review, and where it has been determined that a proposed or current recipient's medical, mental or other circumstances make it impossible to provide proper care in multiple daily visits, care will be provided as it has been in the past, with the home attendant remaining in

the recipient's home during the entire time period for which home care services have been authorized. Thus, for example, a recipient who requires total assistance with toileting, whose toileting needs are frequent and unscheduled, would not be served with the multiple daily visits envisioned by TBA. Rather, in the case of such an individual, the home attendant would stay in the recipient's home during the entire authorized time period, as is presently done in Cluster Care (A176-77).

B. The complaint.

This action was commenced in the United States District Court for the Southern District of New York by summons and class action complaint, on or about February 3, 1997 (A13-50). The plaintiffs orginally named in the complaint were Juana Rodriguez, Mary Weinblad, Christos Gouvatsos, and Sidonie Bennett (A16). Ruvim Aselrod was subsequently added as an intervenor-plaintiff. The original named defendants were Barbara DeBuono, Commissioner of the New York State Department of Health, and Brian Wing, Acting Commissioner of the New York State Department of Social Services (A16). The City of New York and the Departments of Social Services of Westchester County, Suffolk County, and Nassau County were subsequently added to the case as intervenor-defendants (A3).

The complaint alleged that the Task Based Assessment program, as it is currently practiced by the State, fails to provide adequate care and violates various provisions of the federal Medicaid Act and attendant regulations; various provisions of the New York State Social Services Law and attendant

regulations; and, by virtue of these violations are in violation of 42 USC § 1983 (A45-47). In addition, the complaint alleged that implementation of the task based assessment program without public notice violated the New York State Administrative Procedure Act (A47).

As relief, the complaint sought to have the District Court (A48-49):

> (1) enter an order . . . certifying this action as a class consisting of all New York State Medicaid recipients who have been or will be subjected to a task based assessment of their need for Medicaid personal services;
>
> (2) issue a preliminary injunction preventing defendant from permitting further task based assessments and directing them to re-open and correct all cases in which notices of authorizations or reauthorizations after task based assessments have been issued;
>
> (3) declare that the task based assessment programs approved by defendant which fail to make an appropriate individualized assessment of medical need for home care services and fail to provide applicants and recipients with adequate notice of task based assessment determinations violate federal and state laws and regulations . . . ;
>
> (4) permanently enjoin defendants from permitting the continued use of task based assessment instruments and programs which do not provide Medicaid recipients with individually determined, medically necessary amounts of home care services and requiring the defendant to use home care assessment standards, practices and policies

> consistent with the federal and state Medicaid laws . . . ;
>
> (5) declare that the authorization of less home care service time to recipients deemed to need "some" task assistance than that which is authorized for recipients deemed to need "total" task assistance, as those terms are defined in 18 NYCRR § 505.14, violates federal and state law;
>
> (6) permanently enjoin the practice under task based assessment of authorizing less home care service time to recipients deemed to need "some" task assistance than that which is authorized for recipients deemed to need "total" tasl assistance, as those terms are defined in 18 NYCRR 505.14
>
> (7) award plaintiffs their reasonable attorneys fees and costs . . . .

C. The order to show cause seeking preliminary injunction.

By order to show cause, dated February 3, 1997, plaintiffs sought a preliminary injunction and restraining order granting the relief sought in the complaint (A52-55). The order to show cause was supported by the declaration of counsel Donna Dougherty (A57).

Defendants' papers submitted in opposition to the motion for preliminary injunction consisted of the affidavit of Frances M. Louth (A162); the declaration of Judith C. McCarthy (A208); the affidavit of Kathleen Sherry (A246); and the affirmation of Lori A. Alesio (A312).

D. Proceedings on the motion for preliminary injunction.

Proceedings on the motion for a preliminary injunction were held before Hon. Shira A. Scheindlin, U.S.D.J., on April 1, 15, 16, 17, and 23, May 1 and 2, and June 9, 12, 16, 17, 18 of 1997 (A393-2039)

John Turley, Director of Field Operations of the City's Home Services Program, testified on behalf of the City and discussed safety monitoring in the course of his testimony (A1042, A1197). According to Mr. Turley, safety monitoring is an "activity" that typically "occurs in conjunction with another personal care tasks such as ambulation or transferring" (A1197). The home attendant performs safety monitoring as an "accompaniment" to a particular task, *i.e.*, protects the client while the task is performed, but does not monitor safety as a task standing alone (A1197-98).[2]

Also pertinent to the issue of safety monitoring was testimony by **Kathleen Sherry**, who is employed by the State Department of Social Services to develop policies and procedures for the personal care services program (A1261-62). Like Mr. Turley, Ms. Sherry testified that safety monitoring is offered not as a task in itself but in conjunction with recognized personal care services such as ambulating or feeding (A12187). According to Ms. Sherry, in 1985 the State "revised the regulations to allow districts the option of authorizing hours under the device of safety monitoring, so that they could, if they chose to, keep those

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[2] Nassau, Westchester, and Suffolk likewise do not offer provide monitoring as a separate task (A1215, A1312-13, A1395).

individuals in the home" (A1287). As a result some Social Services districts allocate personal care services hours for safety monitoring at times of the day when recognized personal care services are not being performed (A1287). Ms. Sherry testified that safety monitoring is generally provided in conjunction with recognized tasks (A1287).

Ms. Sherry also testified that, in response to her inquiries, the State Department of Social Services received correspondence consisting of two letters from the Health Care Financing Administration ("HCFA") of the federal Department of Health and Human Services (A1293-95). The Court admitted the letters from HCFA into evidence (A1295, A3740-45). The second letter, dated April 15, 1997, states (A3743, A3745):

> Monitoring an individual's activities is an inherent part of Personal Care Services: i.e. a provider that is assisting an individual who is not self-directing, and at risk to themselves or others (e.g., a dementia patient) in meal preparation, bathing, grooming, dressing, etc. is also be [sic] expected to monitor the patient's activities an as [sic] integral part of the Personal Care Service provided. However, we believe that the supervising and/or monitoring of an individual, by itself, when not performing regular Personal Care Services Tasks, is not considered Personal Care Services for Medicaid purposes. As such, Federal financial participation would not be available in such cases.

Ms. Sherry also testified that a recipient who is denied personal care services but whose condition puts the recipient at

risk is not simply left to fend for him/herself. Ms. Sherry stated: "If the person were at risk in the community because of that denial, no provision of home care services, a referral would be made to Protective Services for Adults, who would generally work with the personal care services program to provide some sort of support services until the appropriate placement could be made" (A1267). To the best of her knowledge, no client has ever been abandoned by the local district (A1267). When asked about alternate programs in which such recipients might be placed, Ms. Sherry testified (A1268):

> In the past 10 years, there have been a number of programs that have been developed to serve people who may be medically eligible for nursing home placement but don't really need that medical and highly skilled environment.
>
> There's the assisted living program. There's enriched housing programs. There's adult homes, foster care family program. There's the home and community based waiver program. There's the trauma brain injury program.

E. The District Court order granting a preliminary injunction.

In an amended opinion and order (one paper) dated August 21, 1997, the District Court (Scheindlin, U.S.D.J.) granted plaintiffs motion for a preliminary injunction to the extent of: (1) ordering that defendants include safety monitoring as a separate task on TBA forms, assess the need for safety monitoring, and calculate time allotted for safety monitoring as part of the total personal care services authorized for Medicaid clients: and

(2) that the City of New York included the total number of task hours authorized and the allocations of those hours by the numbers of hours per day as a component of its initial or reauthorization notices (A3964-4020).[3] At the same time, the District Court denied plaintiffs' motion to enjoin TBA procedures as a way of allocating personal home care under Medicaid.

F. This Court's order vacating the preliminary injunction.

Defendants appealed to this Court from the District Court order granting a preliminary injunction (A4029-39).

By order dated November 16, 1998, and amended March 23, 1999, this Court vacated the granting of a preliminary injunction and remanded the case for further proceedings (A4290-307). *Rodriguez v. DeBuono*, 162 F3d 56 (2d Cir. 1998). The ground on which this Court vacated the injunction was that the District Court's finding of irreparable harm was inconsistent with that Court's granting of a stay of enforcement pending appeal (A4302-07). This Court's order made no determination on the merits of the substantive issues in this case.

G. The proceedings upon remand.

Without objection from the parties, the District Court determined that the safety monitoring issue had reached the stage of final determination by the District Court and should be

[3] The City of New York did not appeal from the order that it include a statement of authorized hours in its notices. Nor does it appeal from so much of the order currently appealed from as contains a similar provision.

bifurcated from the other outstanding issues in this case, pursuant to Fed. R. Civ. Pro. 54(b) (A44467-87).

THE ORDER APPEALED FROM

By opinion and order (one paper) entered April 22, 1999, the District Court granted plaintiffs' motion for a permanent injunction and ordered defendants to "include safety monitoring as a separate task on their TBA forms, assess the need for safety monitoring as a separate task, and calculate any minutes allotted for safety monitoring as part of the total personal care services hours authorized, for both applicants and recipients" (A489-459).

As a preliminary matter, the District Court noted that, pursuant to Fed. R. Civ. P. 54(b), it had bifurcated plaintiffs' safety monitoring claim from their span of time claim, and was directing entry of judgment with regard to the safety monitoring issue only (A4494-99).

The District Court found further that 42 USC § 1396(a)(10)(B) supports a private right of action, as do subsections (b) and (c) of 42 CFR 440.230, and that in relying on these provisions, plaintiffs have stated claims upon which relief can be granted (A4503-10).[4]

With regard to the merits of plaintiffs' Medicaid claims, the District Court reiterated its prior holding that "the safety monitoring required by mentally impaired individuals is comparable

[4] With regard to the issue of plaintiffs' private right of action, the City adopts the arguments stated in the State's brief in the instant appeal.

to the services provided to physically impaired individuals," and that defendants' failure to provide safety monitoring as a separate task is therefore in violation of 42 USC § 1396(a)(10)(B) (A4515). As its basis for this holding, the District Court incorporated the reasoning stated in its opinion of August 25, 1997 (A4515). The District Court also incorporated its prior reasoning and holding that defendants are in violation of 42 CFR §§ 440.240(b) and (c), which provide that categorically needy patients, as well as patients in a covered medically needy group, must be eligible for services of equal amount, duration, and scope (A4415-16).[5]

In its discussion of plaintiffs' discrimination claims under the ADA and § 504 of the Rehabilitation Act, the District Court rejected defendants' contention that in the instant case, "where one class of disabled individuals claims it is treated discriminatorily in comparison to another class of disabled individuals," the provisions cited do not apply (A4515). The District Court purported to distinguish three decisions -- *CERCPAC v.Health & Hospitals Corp.*, 147 F3d 165 (2d Cir. 1998); *Doe v. Pfrommer*, 148 F3d 73 (2d Cir. 1998); and *Flight v. Gloeckler*, 68 F3d 61 (2d Cir. 1995) -- in which, as the District Court acknowledged, this Court "stated that the purpose of the anti-discrimination statutes is to bar discrimination against disabled individuals in comparison to the non-disabled" (A4521).

The District Court cited four reasons for distinguishing the instant case, as follows (A4523-27):

---

[5] The District Court's earlier discussion of these issues appears on pages A3995-4004 of the Appendix in this appeal.

. . . First, the Rodriguez plaintiffs are "otherwise qualified" for personal home care services. A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 USC § 12131(2). In the August Opinion, I found that the safety monitoring injunction would apply to individuals with mental impairments who meet New York State's eligibility criteria for the Medicaid personal care services program. See Rodriguez, 177 FDR at 148. Disabled plaintiffs meet the essential eligibility requirements of the home care program as long s they have a stable medical condition and are self-directing. See 18 NYCRR § 505.14(a)(4). Second, the decision to deny personal home care benefits to mentally impaired individuals is motivated 'solely by reason' of their handicap and not because of any wilfulness in their conduct. See Traynor, 485 U.S. 435 (1988).

Third, the Second Circuit's own language that the anti-discrimination statutes "mandate[] only that services provided non-handicapped individuals not be denied [to a disabled person] because he is handicapped," applies to this case. Flight, 68 F.3d at 63. This application becomes apparent when one frames the issue not as a comparison between mentally disabled and "physically disabled" individuals as defined under the ADA, but rather as a comparison between the mentally disabled and the mentally able. A physically disabled person receiving personal home care services may not always be "disabled" for the purposes of the

ADA and § 504. Section 3(2) of the ADA defines a "disability" as a physical or mental impairment that substantially limits one or more of the major life activities of an individual. See 42 U.S.C § 12102(2)(A). Thus, not all impairments are considered a "disability" under the ADA. In determining whether an impairment substantially limits a major life activity, three factors are considered: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent long-term impact of the impairment. See 42 U.S.C. § 12111(8), 29 C.F.R. § 1630.2(j)(1). "Intermittent, episodic impairments are not disabilities, the standard example being a broken leg." Vande Zande v. Wisconsin, 44 F.3d 538, 544 (7th Cir. 1995) (citing 29 C.F.R. § 1630 app., § 1630.2(j)). A temporary or non-chronic impairment, such as a broken hip, may not be considered a "disability" for purposes of the ADA. If the hip heals improperly, resulting in long-term difficulty in walking, the individual might then be deemed "disabled". An elderly Medicaid recipient with a broken hip may receive personal home care services in New York State without being considered "physically disabled" for the purposes of the ADA. Were one to compare this individual with the mentally impaired individuals are then denied "even-handed" treatment vis-a-vis the non-disabled.

Fourth, it is unlikely that the Second Circuit intended the extreme interpretation suggested by defendants here -- that the anti-discrimination statutes offer no protection for the mentally disabled when they are discriminated against by a public entity which does not provide any services to healthy individuals. Consideration of the

> term "mentally disabled" in the context of the Second Circuit's logic would reveal the following: "it is important to bear in mind that the purposes of such statutes are to eliminate discrimination on the basis of [mental] disability and to ensure evenhanded treatment between the [mentally] disabled and the [mentally] able-bodied." Pfrommer, 148 F.3d at 82.

Citing this Court's opinion in *U.S. v. University Hospital*, 729 F2d 144, 156 (2d Cir. 1984), the District Court stated: "Courts have noted that it is difficult to apply the traditional analysis for determining whether an applicant meets the "otherwise qualified" prong of its prima facie case within the context of public programs directed specifically at the disabled" (A4529). The District Court proceeded to state (A4529-30):

> . . . Where, as in the context of this case, it is the handicap itself that gives rise to, or at least contributed to, the need for the services in question, the conventional meaning of "otherwise qualified" cannot be meaningfully applied. See U.S. v. Univ. Hosp., 729 F.2d at 156.
>
> Rather, as articulated by the Supreme Court in Choate, "the question of who is 'otherwise qualified' and what actions constitute "discrimination' under [§ 504] would seem to be two sides of a single coin; the ultimate question is the extent to which a grantee is required to make reasonable modification in its programs for the needs of the handicapped." 469 U.S. at 229 n. 19. The appropriate focus, therefore, is not whether plaintiffs are 'otherwise qualified' for personal care services, "but the extent to which the defendants are

> required by the anti-discrimination statutes to modify their programs to meet all of [plaintiffs'] needs as a disabled individual." *Doe v. Pfrommer*, 148 F.3d 73, 83 (2d Cir. 1998).

The District Court therefore turned its attention to the matter of whether the modifications sought by plaintiffs would change the essential nature of the personal care services program or would impose an undue burden. The District Court cited *Southeastern Community College v. Davis*, 442 US 397 (1978), for the principle that "while a [federal] grantee need not be required to make "fundamental" or "substantial" modifications to accommodate the handicapped, it may be required to make "reasonable" ones ( ). In the opinion of the District Court, "safety monitoring would not cause any meaningful alteration of the personal care services program . . ." ( ). The District Court stated further ( ):

> . . . As explained in this Court's August 25 Opinion, "safety monitoring" for mentally impaired individuals is comparable to the safety monitoring provided to physically impaired individuals. See 177 F.R.D. at 159. Moreover, despite defendants' assertions to the contrary , the evidence at the hearing revealed that they have historically provided and continue to provide safety monitoring to guard against such dangers as wandering out of the house and turning on the stove -- both of which present dangers to cognitively impaired individuals. See i.d. at n. 19.

With regard to the financial burden imposed on defendants by having to provide safety monitoring as an independent task, the District Court, citing 28 CFR § 35.130(b)(7), held that a cost

defense may be asserted "only in the most limited circumstances when an accommodation would 'fundamentally alter the nature of the service, program, or activity'" ( ). The District Court proceeded to state ( ):

> Certainly, the ADA and § 504 do not require that all mentally ill individuals be afforded home care as opposed to institutionalization. However, the defendants have an obligation to provide appropriately integrated services under both the ADA and § 504. See Helen L. v. DiDario, 46 F.3d at 336; Zimring v. Olmstead, 138 F.3d 893, 904. In those limited cases where the cost of maintaining a cognitively impaired person at home exceeds the costs defendants would incur to place the individual in a nursing home (90% of the cost of a residential health facility), defendants can look to the fiscal assessment law, just as they do for high cost cases involving persons with physical impairments. See Rodriguez, 177 F.R.D. at 160-161.

The District Court relied on 28 CFR § 35.130(d) ("[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities") to rebut defendants' argument that mentally and physically disabled Medicaid recipients are offered comparable care, and that it is merely the "modality by which that care is to be delivered" that differs (A4538-39). The District Court stated (A4539):

> The "modality" of care for the physically disabled is delivered at home; and the "modality" of care for the mentally ill is through institutional care. The problem with this argument is that the

> institutionalization of mentally impaired plaintiffs who could otherwise be cared for at home would result in the segregation of the mentally disabled which the ADA sought to end. See 42 U.S.C. §§ 12101(a)(2), (3), (5) and (7) (findings and purposes of ADA stating that discrimination against disabled stems from "stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to society").
>
> Defendants have not shown that the financial burden of a permanent injunction will be "clearly disproportionate" to the benefits it will produce in preventing the unnecessary segregation of mentally impaired patients.

At the conclusion of its decision, the District Court described the irreparable harm that it believed would result from the withholding of safety monitoring as a separately assessed task. The District Court stated (A4542-43):

> . . . The harm at issue here is the inadequate authorization and denial of personal care services to which [plaintiffs are otherwise entitled]. Plaintiffs are elderly, sick and frail. An inadequate home care authorization or denial of any home care could have a devastating effect on their health and safety, causing irreparable harm that cannot be compensated with damages. The Second Circuit recognizes that the denial of essential medical benefits to Medicaid recipients constitutes irreparable harm sufficient for the issuance of an injunction. See Shapiro v. Cadman Towers, Inc., 52 F.3d 328 (2d Cir. 1995) (affirming issuance of preliminary injunction requiring apartment building to provide parking space to plaintiff with multiple sclerosis based on

> "risk of injury and humiliation fromm her inability to walk distances and her incontinence"); see also Caldwell v. Blum, 621 F.2d 491, 498 (2d Cir. 1980) (preliminary injunction granted to medically needy individuals who would , "absent relief, be exposed to the hardship of being denied essential benefits").
>
> Moreover, the possible alternative to home care services -- involuntary separation from one's home, family and community and institutionalization in a nursing home -- is likewise harm that cannot be repaired by money damages. . . .

Finally, the District Court acknowledged that the permanent injunction sought by plaintiffs would have a financial impact on defendant, but insisted that this burden is outweighed by the considerations of harm to plaintiffs (a4544-45):

> . . . It is beyond cavil that injunctive relief will impact State, County, and City budgets, although defendants have difficulty estimating the precise amount. Defendants anticipate the cost of implementing safety monitoring in New York City for applicants with moderate to severe cognitive impairment will be approximately $40.8 million for an estimated 664 new cases during the first year that the Court Order is in effect. The City's share of this is 10%, the State's share is 40% and the federal government's share is 50%. See Affidavit of Kathleen Tyler ("Tyler Aff"), Director of Management and Support Services for the Home Care Services Program, dated October 3, 1997, at ¶ 3. In addition, the City estimates that it will incur $42 million in penalties if, due to the Order, it fails to meet State cost-containment targets. See i.d. at ¶ 12.

> As I noted during oral argument before granting the stay, defendants' figures are speculative. See Transcript from October 23, 1997 ("Oct. 23, Tr.") at 5. However, even if the Court were to accept defendants' estimates, the cost of implementing the Order would be a mere fraction of the $2.7 billion total cost of New York State's home care program. In addition, defendants' costs will be offset to the extent to the extent defendants intended to substitute institutionalization in nursing homes in place of home care which would be less expensive in some circumstances. While defendants have provided no estimate for the competing costs of nursing home care, it is likely that their estimated costs of implementing this Order will be reduced to the extent that some mentally impaired individuals may be cared for at home at a lesser expense.
>
> Furthermore, the injury that will result to plaintiffs' class without safety-monitoring -- involuntary separation from their homes and unnecessary institutionalization in nursing homes -- far outweighs the potential harm incurred by defendants. The public has an interest in protecting its most vulnerable members from practices that do not comply with federal law.

RELEVANT PROVISIONS OF LAW

N.Y. Social Services Law ("SSL") § 62(1) assign to the State's various public welfare districts the responsibility to manage its own public medical assistance program within federal and state guidelines. The section states:

> Subject to reimbursement in the cases hereinafter provided for, each

> public welfare district shall be responsible for the assistance and care of any person who resides or is found in its territory and who is in need of public assistance and care which he is unable to provide for himself.

"Medical assistance," in general and as it applies to personal home health care, is defined in SSL § 365-a(2), as follows in pertinent part:

> "Medical assistance" shall mean payment of part or all of the cost of medically necessary medical, dental and remedial care, services and supplies, as authorized in this title or the regulations of the department, which are necessary to prevent, diagnose, correct or cure conditions in the person that cause acute suffering, endanger life, result in illness or infirmity, interfere with such person's capacity for normal activity, or threaten some significant handicap and which are furnished an eligible person in accordance with this title and the regulations of the department. Such care, services and supplies shall include the following medical care, services and supplies . . . and such medical care, services and supplies as are authorized in the regulations of the department:
>
> * * * *
>
> (e) personal care services, including personal emergency response services, shared aide and an individual aide, furnished to an individual who is not an inpatient or resident of a hospital, nursing facility, intermediate care facility for the mentally retarded, or institution for mental disease, as determined to meet the recipient's need for assistance when cost effective and appropriate in

> accordance with section three hundred sixty-seven-k and section three hundred sixty-seven-o of this title, and when prescribed by a physician, in accordance with the recipient's plan of treatment and provided by individuals who are qualified to provide such services, who are supervised by a registered nurse and who are not members of the recipient's family, and furnished in the home or other location.

SSL § 367-o(1) mandates the State to promulgate an instrument that sets forth the standard for assessing, *inter alia*, the suitability of individual recipients to receive personal home care and what that care will consist of. SSL § 367-o(1) states in pertinent part:

> The commissioner and the commissioner of health, shall establish and periodically revise instruments for home care screening, referral, assessment, eligibility determination, and discharge, which shall be used by certified home health care agencies, providers of long term home health care programs, providers of AIDS home care programs, providers of private duty nursing, and providers of personal care services to determine a recipient's eligibility for and the nature and amount of such services to be provided to the recipient. Such instruments shall:
>
> * * * *
>
> (b) assess the patients's characteristics and service needs, including health, social and environmental needs and whether home care services are appropriate and can be safely provided to the recipient, and shall be used to refer recipients to the home care program which most appropriately and cost effectively meets their needs,

> or other long term care service which is deemed appropriate for the recipient . . . .

42 USC § 1396a of the Medicaid Act states in pertinent part:

> (a) Contents. State plans for medical assistance must --
>
> * * * *
>
> (10) provide --
>
> (B) that the medical assistance made available to any individual described in subparagraph (A) --
>
> (i) shall not be less in amount, duration or scope than the medical assistance available to any other such individual, and
>
> (ii) shall not be less in amount, duration or scope than the medical assistance made available to individuals not described in subpararaph (A) . . . .

Section 202 of Title II of the Americans With Disabilities Act of 1990, as amended ("ADA"), codified as 42 USC § 12132, prohibits State and local government from discriminating based on disability. The provision states:

> 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 public entity.

This language is based on § 504 of the Rehabilitation Act, codified as 29 USC § 794 *et seq.*, which prohibits

discrimination against disabled individuals by programs receiving federal funds. 29 USC § 794(a) provides:

> No otherwise qualified individual with a disability in the United States, as defined in § 706(20) of this title, shall solely b y 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 . . . .

ARGUMENT

POINT 1

PLAINTIFFS' CLAIM OF DISCRIMINATION UNDER THE ADA IS WITHOUT SUPPORT IN THE RECORD.

A. The ADA does not address discrepancies in the treatment of different disabled populations. Accordingly, plaintiffs, who seek to have mentally and physically impaired Medicaid recipient receive identical care, fail to state a cognizable claim under the ADA.

The District Court erred in finding that the City and other defendants have, by failing to provide safety monitoring as a separately assessed task within the personal care services program, violated Section 202 of Title II of the ADA, codified as 42 USC 12132. Section 202 prohibits discrimination against an individual with a disability in the provision of benefits or services by a public entity. *Id.* It does not direct the type of Medicaid services that a State and its constituent counties must provide to its disabled citizens.

Title II of the ADA's non-discrimination statute extended the proscriptions first found in the federal Rehabilitation Act ("Rehab Act"). 29 USC § 794, *et seq.* *See Lincoln CERCPAC v. New York City Health and Hospitals Corp.*, 977 F Supp 274, 279-80 (SDNY 1997), *aff'd*, 147 F3d 165 (2d Cir. 1998). The ADA and the Rehab Act are substantially similar and their provisions are generally read together. *CERCPAC*, 977 F Supp at 279-80; H.R. Rep. No. 101-485(II), 101st Cong., 2d Sess. 84 (1990), *reprinted in* 1990 U.S. Code Cong & Admin. News 303, 367 ("this title essentially simply

extends the anti-discrimination prohibition embodied in section 504 [of the Rehab Act] to all actions of state and local governments"). The ADA was intended to extend the Rehab Act, but not to change the scope of protection. *CERCPAC*, 977 F Supp at 279.

Petitioner's discrimination claim fails because safety monitoring is not provided to non-disabled individuals. The Supreme Court and the Second Circuit have held that the ADA and/or the Rehab Act require no more than that services provided to the non-disabled not be denied to the disabled because of their disability.

In *Alexander v. Choate*, 469 US 287 (1985), for example, the Supreme Court examined the Rehab Act's impact on the provision of Medicaid services. The disabled plaintiffs there sought to challenge the State's reduction in the maximum number of annual days of in-patient hospital care covered by Medicaid. They argued that the reduction had a greater impact on the disabled, and that it was therefore discriminatory under the Rehab Act.

The Supreme Court disagreed, holding that "the State is not required to assure the handicapped 'adequate health care' by providing them with more coverage than the non-handicapped." *Id.* at 309. The Court held that "nothing in the pre- or post-1973 legislative discussion of section 504 [of the Rehab Act] suggests that Congress desired to make major inroads on the State's longstanding discretion to choose the proper mix of amount, scope, and duration limitations on services covered by state Medicaid." *Id.* at 307. The Supreme Court expressly noted that the challenged policy "does not deny the handicapped access to or exclude them

from a particular package of Medicaid services" and that the State program was "equally accessible to both handicapped and nonhandicapped persons." *Id.* at 309.

The Court in *Alexander* further stressed that the regulations governing the Rehab Act could not be read to overturn otherwise reasonable Medicaid coverage rules (*id.* at 308, n. 32):

> Before we would find that these generally worded regulations were intended to limit a State's longstanding discretion to set otherwise reasonable Medicaid coverage rules, that intent would have to be indicated with greater specificity in the regulations themselves or through other agency action.

In reliance on *Alexander,* the Supreme Court reaffirmed in *Traynor v. Turnage,* 485 US 535, 548 (1988), that "the central purpose of § 504 [of the Rehab Act] . . . is to assure that handicapped individuals receive 'evenhanded treatment' in relation to nonhandicapped individuals."

Following the Supreme Court's teaching in *Alexander* and *Traynor,* this Court in *Flight v. Gloeckler,* 68 F3d 61, 63-64 (2d Cir. 1995), affirmed the dismissal of the plaintiff's Rehab Act and ADA claims because the plaintiff had alleged denial of a benefit that was available only to disabled persons. The plaintiff, who suffered from multiple sclerosis, claimed that the denial of a subsidy to modify his car violated both the Rehab Act and the ADA. Rejecting petitioner's Rehab Act claim, this Court held (*id.* at 63-64):

> The statute "d[oes] not clearly establish an obligation to meet [a disabled person's] particular needs vis-a-vis the needs of other handicapped individuals, but mandates only that services provided nonhandicapped

> individuals not be denied [to a disabled person] because he is handicapped." Thus, challenges to the allocation of resources among the disabled under the Rehabilitation Act are disfavored.

With respect to plaintiff's ADA claim, this Court held that the denial of the subsidy for plaintiff's car was based not upon the fact that plaintiff had multiple sclerosis, but, rather, upon his inability to drive. This Court held that the denial of a subsidy based upon the different capabilities among the disabled was not a form of discrimination prohibited by the ADA. *Id.* at 64.[6]

In *CERCPAC*, 147 F3d 165, this Court affirmed the dismissal of the claims by disabled children who were denied services at one rehabilitation center and, instead, transferred to

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[6] We are aware that the Eleventh Circuit has ruled differently in *L.C. by Zimring v. Olmstead*, 138 F3d 893 (11th Cir.), *cert. granted*, 119 S Ct 617 (Dec. 14, 1998).

In *Olmstead*, two inmates in a State psychiatric hospital challenged their confinement, arguing that the failure of the State to place them in a community-based treatment program violated the anti-discrimination provisions of the ADA. 138 F3d at 895. The Eleventh Circuit agreed with the plaintiffs that confinement in a State psychiatric hospital violated the ADA regulations' "integration" provision, and rejected the State's argument that discrimination under the ADA could exist only where the disabled were being deprived of services that were being provided to the non-disabled.

The Eleventh Circuit's holding does not, however, compel the result sought by petitioner here because, even in *Olmstead*, the Eleventh Circuit recognized that deinstitutionalization was not mandated by the ADA if it would "require a fundamental alteration" of a State program. 138 F3d at 904. In light of this, the Eleventh Circuit remanded the case to the District Court to determine whether the costs of transferring psychiatric inmates into community-based programs would "be so unreasonable given the demands of the State's mental health budget that it would fundamentally alter the service it provides." 138 F3d at 905. Furthermore, the Supreme Court has recently granted certiorari to review the Eleventh Circuit's opinion in *Olmstead*, and, thus, the precedential value of that decision has been called into question.

another center. Like the instant plaintiffs, the plaintiffs in *CERCPAC* claimed that the substitution of one set of services with another violated the Rehab Act and the ADA. This Court held that the plaintiffs failed to state a claim under either the Rehab Act or the ADA because they had not alleged that the defendant New York City Health and Hospitals Corporation denied them services available to children without disabilities or the public at large. *CERCPAC*, 147 F3d at 168.

The same principle underlies this Court's decision in *Doe v. Pfrommer*, 148 F3d 73 (2d Cir. 1998). The plaintiff in that case received job counseling services from the New York State Office of Vocational and Educational Services for Individuals with Disabilities ("VESID"). But when his mental health deteriorated, VESID discontinued his services. He filed suit alleging discrimination under the § 504 of the Rehab Act and the ADA. This Court affirmed a finding of summary judgment for the defendant, stating, *id.* at 82:

> . . . [I]t is important to bear in mind that the purposes of such statutes are to eliminate discrimination on the basis of disability and to ensure evenhanded treatment between the disabled and the able-bodied . . . . [I]t is clear that the plaintiff is in essence challenging the adequacy of his VESID services, not illegal disability discrimination.

Despite the unequivocal position of this Court that an ADA discrimination claim must rest on the discrepancy between services provided to plaintiffs and those offered to a non-disabled

population, the District Court purported to distinguish this case from those cited above. It advanced four reasons.

The first reason was that, apart from their mental disabilities, "the *Rodriguez* plaintiffs are 'otherwise qualified' for personal home care services" (A4523). Assuming, *arguendo*, that this is a meaningful distinction, it nonetheless has no bearing on the principle that the ADA was designed to correct inequities between the disabled and the non-disabled. Moreover, the assertion that plaintiffs are "otherwise qualified" is meaningless in the context of this case, as the District Court virtually acknowledged elsewhere in its opinion. In the language of the District Court itself: "Where, as in this case, it is the handicap itself that gives rise to, or at least contributed to, the need for the services in question, the conventional meaning of 'otherwise qualified' cannot be meaningfully applied" (A4529). Or, to put it differently: How, apart from their disabilities, can plaintiffs be "otherwise qualified" for personal care services, when it is those very disabilities that are asserted as the reason for their being "qualified" for such services?

As a second reason, the District Court, citing *Traynor v. Turnage*, 485 US 535 (1988), stated that "the decision to deny personal home care benefits to the mentally impaired is motivated 'solely by reason' of their handicap and not because of any wilfulness in their conduct" (A4524). Once again, the alleged distinction has no bearing on the principle that the ADA is directed at discrepancies in opportunities available to disabled and non-disabled individuals. Moreover, one fails to see how this

point in any way distinguishes the instant case from the cited decisions of this Court.

Third, the District Court adduces the principle that "a non-chronic impairment, such as a broken hip, may not be considered a 'disability' for the purposes of the ADA" (A4525). The District Court then makes the following extrapolation (A4526):

> . . . An elderly Medicaid recipient with a broken hip may receive personal home care services in New York State without being considered "physically disabled" for the purposes of the ADA. Were one to compare this individual with the mentally impaired individuals currently denied care, it would seem that mentally impaired individuals are then denied "even-handed" treatment vis-a-vis the non-disabled.

To appreciate the futility of this line of reasoning, it is merely necessary to carry it to its logical conclusion. If it is the case that physically disabled recipients may not be "disabled" within the meaning of the ADA, the same is equally true of the mentally impaired for whom plaintiffs seek safety monitoring at home. An individual, for example, whose cognitive abilities are temporarily impaired by a blow to the head may eventually heal and recover. According to the logic of the District Court, the mentally disabled Medicaid recipients who are denied access to personal care services are thus treated identically with non-disabled recipients, and have no basis whatsoever for a discrimination claim.

Fourth, the District Court makes the following assertion (A4526): "[I]t is unlikely that the Second Circuit intended the extreme interpretation suggested defendants here -- that the anti-

discrimination statutes offer no protection for the mentally disabled when they are discriminated against by a public entity which does not provide any services to healthy individuals." This argument presumes that this Court will, out of sympathy for plaintiffs, employ the ADA for purposes for which that law was never intended. But in response to a previous ADA claim, this Court declined to require that government services be provided to a plaintiff who was "in essence challenging the adequacy of his VESID services, not illegal disability discrimination." *Doe v. Pfrommer,* 148 F3d 73, 82 (2d Cir. 1998). Granting a permanent injunction on ADA grounds to plaintiffs would be similarly inappropriate and unjustified.

B. The inclusion of safety monitoring as a separate task would fundamentally alter the nature of the personal care services and is therefore not required by the ADA.

Even assuming, *arguendo,* that the ADA supports a claim for identical care for the medically and physically disabled, the Supreme Court has held that the Rehab Act does not require fundamental changes, alternations, or modifications in a State's Medicaid programs. See *Southeastern Community College v. Davis,* 442 US 397, 410-13 (1979); *Alexander,* 469 US at 299-303. *See also* 28 CFR § 35.130(b)(7) (integration does not require that State programs be fundamentally modified). As the Supreme Court stated in *Alexander,* the Rehab Act "struck a balance between the statutory rights of the handicapped to be integrated into society and the

legitimate interests of federal grantees in preserving the integrity of their programs." *Alexander*, 469 US at 300. As a result, "fundamental alteration in the nature of a program" is not required by the statute or regulations. *Davis*, 442 US at 410; *see also* 28 CFR § 35.130(b)(7).

In its decision, the District Court erroneously asserts that "[t]he provision of independent safety monitoring would not cause any meaningful alteration of the personal care services program" (A4532). The District Court supports this conclusion by claiming that "the evidence at the hearing revealed that [defendants] have historically provided and continue to provide safety monitoring to guard against such dangers as wandering out of the house and turning on the stove -- both of which present dangers to cognitively impaired individuals" (A4532).

The key point missed by the District Court is that, although safety monitoring has in the past been provided in conjunction with recognized tasks, it has never served as an independent basis for eligibility to the personal care services programs. Once it serves as such a basis, the population, and with it the fundamental nature, of the personal care services program will alter dramatically. A program designed to meet the daily living needs of the physically homebound will become available to a non-homebound population of individuals whose mental incapacities nonetheless make them a danger to themselves. The District Court seems to have lost sight of the fact that the scope of its order extends well beyond certain elderly Alzheimer patients for whom institionalization in a nursing home is the alternative to home

care. Once applicants for personal care services need show no more than the need for safety monitoring, the program will be open to physically able patients suffering from afflictions such as schizophrenia, autism, or severe depression. It should be obvious that the care of such patients would demand a home care worker with specialized skills beyond those required for the care of a homebound patient whose maladies include mental disorientation.

The District Court minimizes the financial impact of its order by arguing that the fiscal assessment law (the cost of treating an individual through personal care services may not exceed 90% of treating that individual in a nursing home) keeps the cost of personal care services less than that of institutionalization. But testimony before the District Court reveals that programs currently offered as alternatives to personal home care include assisted living programs, enriched housing programs, adult homes, and a brain trauma injury program (A1268). As a result of the proposed change, patients who would otherwise be treated in group settings will each have access to their own personal care attendant. The financial impact of such a change would be significant.

As estimated in the affidavit of Kathleen Tyler, dated May 27, 1999, and annexed to the City's application for a stay pending appeal ("Tyler Affidavit"), the cost of providing personal care services would rise approximately $0.10 per hour. Tyler Aff. ¶ 7. At the current rate of service, this increase would impose on the City an additional cost of $9,780,000 per year. In addition, the Tyler Affidavit estimates additional costs to the City, for the

first year, of $40.8 million based on an increase in the population of program. Tyler Aff. ¶ 23. In addition, the City is subject to a medical assistance savings target imposed by the State. To the extent that the additional costs imposed by the District Court order place the City in excess of its savings target, the City must reimburse the State the amount of that excess, up to a total of $42 million, from additional tax levy dollars. Tyler Aff. ¶¶ 32-33.

The District Court cavalierly dismisses such costs as "a mere fraction of the $2.7 billion total cost of New York State's home care program" ( ). But for a City in which education and a host of worthy social services all compete for their share of a limited fiscal pie, the millions of dollars in increased expenditures that would result from the District Court's order impose a heavy burden.

C. The District Court's determination that the failure to provide safety monitoring as an independent task violates "integration" regulations is without basis in the record.

Finally, the District Court claims that the failure to provide safety monitoring as an independent task places defendants in violation of the "integration" requirement of regulations implementing the ADA. The District Court's conclusion is without basis in the record.

It is undoubtedly the case that services, programs and activities must be provided to the disabled in the "most integrated setting appropriate to the needs of qualified individuals with

disabilities," 28 CFR § 35.130(d) (1998). In the view of the District Court, the failure to include mentally impaired patients as a separate class of individuals entitled to personal care services results in the "segregation" of these individuals in institutions. But the "integration" regulation is not an independent statute to be interpreted and applied separate and apart from the underlying legislation and the courts' interpretation thereof. The ADA's legislative history indicates that the "integration" requirement, like the rest of the ADA regulations, was designed to prevent discrimination in the access to programs that are otherwise available to the non-disabled. The most in-depth legislative discussion on the "integration" requirement makes this interpretation clear by referring to "integration" in the context of the provision of services that are "offered to others" (H.R. Rep. No. 101-485(III), 101st Cong., 2d Sess. 50 (1990), *reprinted in* 1990 U.S. Code Cong. & Admin. News 445, 473):

> As with Section 504 of the Rehabilitation Act, integrated services are essential to accomplishing the purposes of title II. . . . 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 this title. Nor is the fact that the separate service is equal to or better than the service offered to others sufficient justification for the involuntary different treatment for persons with disabilities. While Section 504 of the Rehabilitation Act and this title do not prohibit the existence of all separate

> services which are designed to provide a benefit for persons with disabilities, such as specialized recreation programs, the existence of such programs can never be used as a basis to exclude a person with a disability from a program that is offered to persons without disabilities, or to refuse to provide an accommodation in a regular setting.

See also H.R. Rep. No. 101-485 (II), at 102-03, *reprinted in* 1990 U.S. Code Cong. & Admin. News at 385-86.

Similarly, the comments provided by the Department of Justice in promulgating the regulations which set forth the "integration" requirement also reveal that the goal of the "integration" requirement is to include the disabled in programs and services that are offered to the non-disabled (56 Fed. Reg. 35,694 (July 26, 1991)):

> The Department recognizes that promoting integration of individuals with disabilities into the mainstream of society is an important objective of the ADA . . . .
>
> Even when separate programs are permitted, individuals with disabilities cannot be denied the opportunity to participate in programs that are not separate or different. This is an important and overarching principle of the Americans with Disabilities Act. Separate, special or different programs that are designed to provide a benefit to persons with disabilities cannot be used to restrict the participation of persons with disabilities in general, integrated activities.
>
> For example, a person who is blind may wish to decline participation in a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the exhibit at his or her own pace with the museum's recorded tour.

As explained above, plaintiffs' discrimination claim is predicated on a comparison of the treatment accorded mentally and physical impaired Medicaid recipients. Like the particular health

care facility sought in *CERCPAC*, the vehicle modifications sought in *Flight*, and the job counseling services sought in *Pfrommer*, payment for the personal care services sought in the case at bar are provided only to individuals with disabilities. The Rehab Act and the ADA therefore do not apply.

Moreover, the District Court's belief that personal care services are less "segregating" than institutional care or alternative programs is merely an assumption without support in the record. One can imagine any number of circumstances in which precisely the opposite is true. Institutionalization may well provide a variety of human interactions to patients who would remain socially isolated if they were receiving home care. Programs such as assisted living, for example, encourage patients to participate in the world to the maximum extent possible.

In short, the District Court's determination that the failure to provide safety monitoring as an independent task violates federal "integration" requirements is based on an erroneous understanding of the law and on arbitrary factual assumptions.

POINT II

THE ABSENCE OF SAFETY MONITORING AS AN INDEPENDENTLY ASSESSED TASK WITHIN PERSONAL CARE SERVICES DOES NOT VIOLATE THE MEDICAID ACT'S COMPARABILITY PROVISION.

The City' position on the issue of comparability coincides with that of the State defendants as presented in their brief filed in this appeal. In order to avoid unnecessary

repetition, we respectfully refer this Court to, and rely on, the State defendants' brief with respect to this issue.

POINT III

PLAINTIFFS HAVE FAILED TO DEMONSTRATE ANY IRREPARABLE HARM THAT WOULD RESULT DEFENDANTS' FAILURE TO INSTITUTE SAFETY MONITORING AS AN INDEPENDENT TASK.

It cannot be emphasized too strongly that this case is not about whether mentally impaired Medicaid recipients will receive treatment. Rather it is about whether that care must be delievered at home or may, an an alternative, be carried out through a nursing home or other outside program. Thus, any harm alleged by plaintiffs relates not to *whether* they receive care but to *where* they receive care.

Absent instituting safety monitoring as an independent task, the District Court foresees irreparable harm arising from "the denial of essential medical benefits to Medicaid recipients" (A4542). But the record in this case is devoid of any showing that a single institutionalized individual in the plaintiff class has been denied necessary treatment. On the contrary, where institutionalization occurs, its purpose is to facilitate the required medical care. Medicaid does not place frail and elderly recipients in nursing homes so as to abandon them and leave them to their own devices. Nor does the record indicate that Medicaid has institionalized patients who would otherwise have the capacity to be "integrated" into the general population. The District Court's

finding of irreparable harm is therefore unsupported and without basis.

CONCLUSION

THE ORDER AND DECISION (ONE PAPER) AND THE JUDGMENT APPEALED FROM SHOULD BE REVERSED, AND THE PERMANENT INJUNCTION DENIED, WITH COSTS.

June 22, 1999

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accord with Fed. R. App. P. 32(a)(7)(c), I certify that, excluding the cover, table of contents, table of authorities, and this certification, this brief contains 10,741 words as recorded by the word count of the Word Perfect 5.1 word-processing system used to prepare this brief.

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