99-7572L

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

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

Plaintiffs-Appellees,

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

Intervenor-Plaintiff-Appellee,

-against-

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

Intervenors-Defendants-Appellants.

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

Defendants-Appellants,

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

**BRIEF FOR STATE DEFENDANTS-APPELLANTS
WHALEN AND WING**

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Preliminary Statement

Defendants-appellants Dennis Whalen, Acting Commissioner of the New York State Department of Health, and Brian Wing, Commissioner of the New York State Office of Temporary and Disability Assistance (collectively the "State"), appeal from an Order and Judgment of the United States District Court for the Southern District of New York (Shira A. Scheindlin, J.), permanently enjoining the State to add the function of unlimited "safety monitoring as a separate task" to its Medicaid personal care services program. [1]

Statement of Appellate and Subject Matter Jurisdiction

The district court's jurisdiction was predicated on 28 U.S.C. §1331, 42 U.S.C. §1396 and 42 U.S.C. §1983. This Court's jurisdiction is predicated on 28 U.S.C. §1291.

Issues Presented For Review

1. Whether for purposes of Medicaid "comparability" provisions, 42 U.S.C. §1396a(a)(10)(b) and 42 C.F.R. §440.240(b): (a) unlimited "safety monitoring" of the mentally disabled is equivalent to traditional personal care tasks such as housekeeping, preparation of meals, toileting, bathing and dressing; and

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[1] The State joins in the City defendant's arguments addressing plaintiffs' claims under the Americans With Disabilities Act, 42 U.S.C. §12132, and the Rehabilitation Act, 29 U.S.C. §794, and has not briefed those issues.

(b) individuals with dissimilar medical conditions are required to be provided with the same treatment or services.

2. Whether 42 C.F.R. §440.230(b), the "amount, duration and scope" regulation, creates a private right of action, and if so, whether the State failed to provide personal care services for the great majority of Medicaid recipients needing such services.

3. Whether 42 C.F.R. §440.230(c), which by its terms is limited to "required" services, is applicable to the "optional" personal care services which are at issue in this case, and if so whether the State illegally discriminates in providing personal care services on the basis of medical diagnosis.

4. Whether the State is entitled to deference in interpreting its Medicaid personal care services program as not providing unlimited safety monitoring as a separate task, when inter alia, the federal agency responsible for administering the federal Medicaid Act similarly does not interpret personal care services to include safety monitoring as a separate task.

Statement of the Case

Personal Care Services

Medicaid is a joint federal-state initiative that provides medical assistance to qualified needy persons. While participating states are required to provide certain mandatory services under their Medicaid plans, "personal care services" programs are optional.

State regulations define personal care services as assistance with particular discrete tasks such as light housekeeping, shopping, toileting, bathing, feeding, and walking, which are medically necessary and are reasonably capable of maintaining the health and safety of the recipient in the home. 18 NYCRR §505.14 (a)(4), (6)(i)(a), (ii)(a); Joint Appendix ("A") 250, 252.[2] Nonself-directing (mentally impaired) patients requiring continuous supervision and direction for making choices about daily living are not eligible for personal care services unless another person, typically a family member or friend, assumes responsibility for making choices about their activities of daily living. A 254; 18 NYCRR § 505.14(a)(4)(ii).

New York's Medicaid plan includes coverage of personal care services "as determined to meet the recipient's needs for assistance when cost effective and appropriate..."[3] Social Services Law (SSL) §365-a(2)(e). Personal care recipients are assessed to

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[2] In contrast, "home health services" is a mandatory program. 42 C.F.R. §440.70, §440.220(a)(3). It encompasses services that are strictly health-related including nursing services, physical therapy, occupational therapy, speech pathology and audiology services. 18 NYCRR §505.23.

[3] The federal Medicaid Act authorizes payment for personal care services to qualified individuals when the services are "(A) authorized for the individual by a physician in accordance with a plan of treatment or (at the option of the State) otherwise authorized for the individual in accordance with a service plan approved by the State, (B) provided by an individual who is qualified to provide such services and who is not a member of the individual's family, and (C) furnished in the home or other location." 42 U.S.C. §1396d(a)(24).

determine, inter alia, if a plan of care "can maintain the recipient's health and safety in the home as defined by the department of health in regulation," and whether the recipient "can be appropriately and cost-effectively served through other long-term care services..." SSL §367-k(2)(i) and (v).

The "amount, nature and manner" of personal care services is assessed by local social services districts (individual counties and the City of New York) (SSL §§ 62[1], 365-a), many of whom use a methodology known as task-based assessment ("TBA"). TBA evaluates the recipient's specific needs for assistance with individual tasks. Generally, the time needed to perform these tasks is drawn from standard schedules that are based on the local district's experience with its home care population, although TBA permits flexibility to accommodate individual circumstances. A 270, 1287.

The purpose of TBA is to avoid wasted expenditures for time periods when home care attendants are not assisting with recognized home care tasks. A 262-5. TBA also serves to avoid duplication with supports provided by other programs and problems related to inappropriately assessed home care. A 954-5, 1271.

History of the Action

Plaintiffs commenced this class action pursuant to 42 U.S.C. §1983 in early 1997. They sought to certify a class of all Medicaid personal care services recipients and applicants in the state who are assessed by TBA. They claimed, inter alia, that

the State discriminated against a subclass of mentally disabled recipients because "safety monitoring" is not included as a separate task by task-based assessment and it allegedly is comparable to assistance with traditional personal care tasks. The State maintained, however, that this claim misperceives the basic purpose of the personal care services program, which is to assist recipients (both the physically and mentally disabled) with the safe completion of discrete daily household activities and tasks, and that "safety monitoring" is provided only as an incident to the performance of those tasks. A 1286-7. The State does not consider the continuous intensive monitoring needed to protect mentally impaired individuals from harming themselves to be a function of this program (A 1197-8, 1296-7, 1301, 1329) especially when that care is more appropriately provided by other Medicaid programs such as residential health care facilities (nursing homes). A 255-56, 269, 1268.

After a hearing in April, May and June 1997, the district court granted plaintiffs' motion for a preliminary injunction, in part. Rodriguez v. DeBuono, 177 F.R.D. 143 (S.D.N.Y. 1997), vacated in part, 162 F.3d. 56 (2d Cir. 1998), amended, 1999 WL 247113 (March 23, 1999). The court held that task-based assessment violated federal Medicaid "comparability" provisions, 42 U.S.C. §1396a (a)(10)(B) and 42 C.F.R. § 440.240(b), but declined

to grant relief based upon plaintiffs' other claims.[4] It ordered the 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

and certified a subclass of home care recipients and applicants with a purported need for this service. 177 F.R.D. at 153, 167.

The defendants appealed and on October 23, 1997 the district court stayed its preliminary injunction pending appeal. On November 16, 1998, this Court vacated the preliminary injunction because the district court had misapprehended the requirement of "imminent irreparable harm." Rodriguez, 162 F.3d at 62.

On remand, the district court converted its preliminary injunction into a permanent injunction pursuant to Fed.R.Civ.P. 54(b), adopting its prior reasoning on the issue of "safety monitoring." Opinion and Order dated April 19, 1999, A 4515. The defendants appealed, and on June 8, 1999, this Court granted their motion for a stay and an expedited appeal.

Summary of Argument

The district court erred in attempting to transform New York's Medicaid personal care services program into a program requiring unlimited "safety monitoring" for the mentally dis-

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[4] Additional relief, not relevant here, was granted against the specific TBA plan used by the City defendant. Rodriguez, 177 F.R.D. at 167.

abled. The federal Medicaid provisions governing personal care services, 42 U.S.C. §1396a(d)(24) and 42 C.F.R. §440.167, do not require that states provide safety monitoring as a separate task. Moreover, the federal agency responsible for Medicaid (the Health Care Financing Administration ["HCFA"]) does not interpret "personal care services" under the federal Medicaid Act to include "safety monitoring" as a function separate from the assistance with traditional daily tasks and activities.

Similarly, the Medicaid "comparability" provisions, 42 U.S.C. § 1396a(a)(10)(B), 42 C.F.R. § 440.240(a) and (b)(1), do not require the State to offer a separate "safety monitoring" service in this program. The continuous and unlimited safety monitoring of the mentally disabled is not comparable to the performance of discrete personal service tasks such as meal preparation, and assistance with bathing or toileting. Moreover, the "comparability" provisions do not prevent the State from offering different services to patients with different medical needs. Plaintiffs identified only three individuals for whom the State allegedly denied access to the personal services program because of their claimed need for "safety monitoring as a separate task." These individuals, Russo, David and Reece, suffered from mental impairments which left them unaware of their own surroundings and at continual risk to themselves, and were more appropriate for other programs.

In addition, 42 C.F.R. §440.230(b), the "amount, duration and scope" regulation, does not create a private right of action because, at most, the regulation establishes a standard for systemic program performance, rather than individually enforceable rights. Additionally, 42 C.F.R. §440.230(c) covers mandatory, not optional, services and therefore is inapplicable to this case.

Finally, the State never contemplated that its personal care services program would provide unlimited continuous "safety monitoring" as a separate task, and it does not interpret its regulations as requiring the performance of that function. In concluding otherwise, the district court failed to afford the State's interpretation of its own Medicaid statute and regulations the required deference, Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984), and also ignored the HCFA's interpretation of the term personal care services.

POINT I

THE STATE WAS NOT REQUIRED TO INCLUDE UNLIMITED "SAFETY MONITORING" IN ITS MEDICAID PERSONAL CARE SERVICES PROGRAM AND THE FEDERAL MEDICAID "COMPARABILITY" PROVISIONS DO NOT REQUIRE A DIFFERENT RESULT

Undisputedly, the Medicaid Act "confers broad discretion on the States to adopt standards for determining the extent of medical assistance", Beal v. Doe, 432 U.S. 438, 445 (1977), and affords them "maximum flexibility" to tailor their programs to meet recipients' needs. CCH Medicare & Medicaid Guide, ¶45,624 at 55,279. See also, Kuppersmith v. Dowling, 93 N.Y.2d 90, 1999

WL 161530 at *4 (March 25, 1999). Therefore, "[o]nce the sixty-two statutory minima in section 1396a(a) are met, each participating state has wide discretion in administering its local program." Visiting Nurse Association of North Shore, Inc. v. Bullen, 93 F.3d 997, 1008 (1st Cir. 1996).

The federal provisions governing personal care services are brief and leave room for interpretation. Neither 42 U.S.C. § 1396d(a)(24) nor 42 C.F.R. § 440.167 requires the states to include separate and unlimited "safety monitoring" in their personal care services programs. Moreover, in response to a specific State inquiry about the scope of personal services (A 3737), the HCFA responded that while monitoring an individual's activities, including those of a dementia patient, is "an inherent part" of personal care services,

> [w]e 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.

A 3745 (emphasis added).[5] Consequently, nothing in the federal

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[5] HCFA recently bolstered this interpretation of personal care services with its statement, in pertinent part, that

> personal care services ... covered under a State's program may include a range of human assistance provided to persons with disabilities and chronic conditions which enables them to accomplish tasks that they would normally do for themselves if they did not have a disability.

State Medicaid Manual, Part 4, HCFA Pub. 45-4 Transmittal No. 72, Jan. 1, 1999 (Med-Guide-TB ¶ 150,239). The transmittal made no reference at all to "safety monitoring" and mentioned "supervi-

concept of Medicaid personal care services required New York to include unlimited safety monitoring as a separate task in its Medicaid plan and we submit that the federal Medicaid comparability provisions do not require a different result.

A. The District Court Misread The Federal Medicaid Comparability Provisions

The Medicaid "comparability" statute requires that the medical assistance made available to any "categorically" needy individual "must not be less in amount, duration or scope" than the medical assistance made available to any other "categorically" needy individual or any "medically" needy individual. 42 U.S.C. § 1396a(a)(10)(B); Hodecker v. Blum, 525 F. Supp. 867, 871-72 (N.D.N.Y. 1981), aff'd, 685 F.2d 424 (2d Cir. 1982). Applicable federal regulations restate these requirements. 42 C.F.R. § 440.240(a) and (b)(1).

Congress's original purpose in enacting a comparability requirement was to assure the "categorically needy" or the neediest group of Medicaid recipients,[6] "first call" to the

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sion" only in the context of ensuring "that the individual performs the task properly." (Emphasis added).

[6] The "categorically needy" are aged, blind or disabled persons who are eligible for cash assistance under the Supplemental Security Income ("SSI") program, or those families and children who are eligible for cash assistance under the former Aid to Families with Dependent Children ("AFDC") program. The "medically needy" are persons who meet nonfinancial eligibility requirements for cash assistance under the SSI or AFDC programs, but whose income or resources exceed program financial eligibility standards. 42 U.S.C. § 1396a (a)(17); DeJesus v. Perales, 770 F.2d 316, 318-19 (2d Cir. 1985), cert.

limited supply of public funds for medical assistance. Camacho v. Perales, 786 F.2d 32, 38 (2d Cir. 1985) ("Congress' fundamental premises in structuring programs to aid the needy were (1) that the supply of public funds is not inexhaustible and (2) that the primary concern of the states in providing financial assistance should be ... the categorically needy" rather than the "medically needy").

Historically, case law in this circuit applied "comparability" provisions to income and resource budgeting methodologies that improperly distinguished between the "categorically" and "medically" needy. See DeJesus, 770 F.2d at 328; Friedman v. Berger, 547 F.2d 724 (2d Cir. 1976), cert. denied, 430 U.S. 984 (1977); Caldwell v. Blum, 621 F.2d 491 (2d Cir. 1980), cert. denied, 452 U.S. 909 (1981); Calkins v. Blum, 511 F. Supp. 1073 (N.D.N.Y. 1981), aff'd, 675 F.2d 44 (2d Cir. 1982). Cases in other circuits have broadened the "comparability" principle to hold that equivalent benefits must be available among other groups of Medicaid recipients. See e.g., Blanchard v. Forrest, 71 F.3d 1163 (5th Cir. 1996), cert. den., 116 S. Ct. 2540 (1996) (overturning a policy of covering pre-application medical expenses for certain recipients who paid their bills, but not for others); Clark v. Kizer, 758 F. Supp. 572 (E.D. Cal. 1990) (rejecting policy that provided dental services to residents of only some counties in the state).

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denied, 478 U.S. 1007 (1986).

No case, however, except the present one, has held that "comparability" requires a state to add services to its Medicaid program for the benefit of a particular group. For example, in Beal v. Doe, 432 U.S. 438, 448 n.11 (1977), the Supreme Court rejected a claim that Medicaid comparability requires states to fund non-therapeutic abortions. Similarly, in Harris v. James, 127 F.3d 993, 1012 (11th Cir. 1997), the Eleventh Circuit refused to find a "federal right of transportation" under 42 U.S.C. §1396a(a)(10)(B), stating, "we do not think that transportation to and from providers is reasonably understood to be part of the content of a right to ... comparable assistance." See also King v. Fallon, 801 F. Supp. 925, 928 (D.R.I. 1992) (Medicaid recipients denied placement in certain facilities failed to show a violation of 42 U.S.C. §1396a(a)(10)(B) because they did not prove that recipients with similar medical needs were treated differently).

The solitary case upon which the district court relied -- Sobky v. Smoley, 855 F. Supp. 1123 (E.D. Cal. 1994) -- is distinguishable because it too did not require the addition of a new category of services to a Medicaid program. In Sobky, funded methadone therapy was available to individuals in certain counties of California, but not in other counties. Therefore, the Sobky court required the state to provide access to funded methadone therapy in all counties.

Here, by contrast, the district court has ordered the State to fund "safety monitoring as a separate task," a benefit that is not provided in New York's personal services program. A 1301, 1513, 1702, 3743-45. This interpretation of the comparability requirement vitiated the State's discretion to establish the content and parameters of its Medicaid plan:

> Despite the comparability requirement, the state retains substantial discretion in determining eligibility standards and in choosing the overall mix of optional benefits to include in its plan.

Sobky v. Smoley, 855 F. Supp. at 1142 (E.D. Calif. 1994).

In addition, the district court's interpretation of the comparability principle resulted in an internally inconsistent ruling. For example, with respect to the issue of "toileting," the court held this was "an example of an unscheduled and recurring need that occurs over a span of time," and severed plaintiffs' "span of time" claims for a later trial. 177 F.R.D. at 152; A 4493 n. 5. On the other hand, the court also implied that "toileting" was a "safety monitoring" issue. Rodriguez, 177 F.R.D. at 159. The district court thus failed to clearly define the very function it enjoined the State to assess -- "safety monitoring as a separate task" -- instead suggesting that the defendants merely resume their "pre TBA" definition of the program. A 4533. Yet, the evidence showed that the State had never required the program to include that service. A 1513,

3757, 3764.[7] Therefore, the State was left to speculate, at its own peril, to determine what the court meant by "safety monitoring as a separate task."[8]

B. "Comparability" Does Not Require Individuals With Dissimilar Medical Needs To Receive The Same Treatment

The district court further erred in holding that comparability prohibited the State from distinguishing between patients with physical and mental disabilities. To the contrary, that principle does not prohibit "a State from offering different services to persons in different categories of medical need or with different degrees of medical necessity." King v. Sullivan, 776 F. Supp. at 654 (D.R.I. 1991). See also White v. Beal, 555 F.2d 1146, 1150-52 (3d Cir. 1977) ("regulations permit discrimination in benefits based upon the degree of medical necessity"). Comparability requires that "standards shall be comparable, not identical, for all groups." DeJesus v. Perales, 770 F.2d at 324. (emphasis added). The evidence showed that the State's

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[7] Plaintiffs offered no proof below as to specific task-based instruments used by districts outside of New York City and Nassau, and plaintiffs' experts never examined TBA instruments used by most of the defendants. A 960-1, 1144. Although the evidence showed that counties such as Suffolk and Westchester have used TBA since the early 1990s, A 1269, 1673-73, 1824, 1732-33, there were no aggrieved individuals in those counties. October 23, 1997 Hearing Transcript, p. 7.

[8] Under the court's reasoning, "safety monitoring" theoretically includes providing home care attendants to accompany disabled recipients living in unsafe neighborhoods, or to avoid the dangers of "social isolation." A 260-61. In contrast, the court also recognized that "companionship" is not part of the home care program. Rodriguez, 177 F.R.D. at 158, n.18.

"illegal policy" was nothing more than its recognition that individuals suffering from mental impairments -- when in constant danger of injuring themselves in the home environment -- are inappropriate candidates for personal care services, as opposed to services provided in other programs. A 254-55, 269, 1821-22.

For example, plaintiff Amelia Russo needed twenty-four hour supervision because she suffered from Alzheimer's disease, wandered excessively, created fire hazards and assaulted her home care aide.[9] Similarly, intervenor Ann Reece required constant supervision to the point where it was necessary to barricade her door at night. A 3326-7. The impracticality of providing traditional home care to her was evident when the attendant attempted to do the laundry and Ms. Reece "left the apartment and was wandering around in the complex." Id. Intervenor Mariamma David also was in constant danger of self-injury because of her physical and mental illnesses. As a result of a cognitive syndrome, she had forgotten where the bathroom was located, was incapable of remembering to take her medication and could not

[9] The State agency "fair hearing" decision denying personal care services to Amelia Russo stated in relevant part: "Appellant suffers from Alzheimer's disease ... Appellant is forgetful ... there have been episodes of wandering, and ... Appellant needs twenty-four hour supervision. Appellant was also abusive towards one aide and struck the aide with a broom. There was at least one instance when Appellant turned on the stove burners and left them on. The Agency determined that with such impaired judgment, Appellant's health and safety in the home setting cannot be assured without additional services that could not be supplied by personal care services in the home setting...." A 2056-57.

recall what day it was. A 3337. In the district court's view, however, the State has no discretion to decide that the costs and risks of continuous home care supervision for such patients outweigh its benefits, and arguably the State must provide two attendants simultaneously to provide services for these patients, one for traditional tasks and one for "safety monitoring."

Remarkably, and contrary to existing comparability principles, the district court found that "preventing a dementia patient from wandering into the street" is comparable to turning and repositioning a bedbound recipient several times a day." Rodriguez, 177 F.R.D. at 159. This analogy was inapt on its face because unlimited and continuous supervision to avoid self-injury is not equivalent to providing assistance with routine and discrete tasks such as housekeeping, meal preparation, toileting, bathing, and the like. Moreover, equating radically different needs implies that virtually all care is "comparable."

POINT II

THE DISTRICT COURT ERRED IN FINDING THAT THE STATE VIOLATED MEDICAID REGULATIONS 42 C.F.R. §440.230(B) AND (C)

A. The "Amount, Duration and Scope" Regulation

Federal Medicaid regulation 42 C.F.R. § 440.230(b) states simply that each service provided in a State Medicaid plan "must be sufficient in amount, duration and scope to reasonably achieve its purpose." Id. The district court erred in finding that this regulation creates a private right of action and further that the

State violated it.[10]

A three-prong test is used to determine if a federal statute is enforceable under 42 U.S.C. §1983: (1) Congress must have intended that the provision benefit the plaintiff, (2) "plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence", and (3) the statute must impose unambiguously a binding obligation on the states. Blessing v. Freestone, 117 S. Ct. 1353, 1359 (1997), citing, Wright v. Roanoke Redevelopment and Housing Authority, 479 U.S. 418, 430-32 (1987).

In applying the three-prong test, a court must examine the statutory provision "in very specific terms" and, absent further statutory guidance, a requirement merely that a state undertake "reasonable efforts" to accomplish a purpose is too vague to be enforceable in a private action. Blessing v. Freestone, 117 S. Ct. at 1362, citing Suter v. Artist M., 503 U.S. 347, 360-62 (1992). A law cannot constitute a federal right if it does not create an individual entitlement to services but is "designed only to guide the State in structuring its systemwide efforts..." Blessing, 117 S. Ct. at 1361.

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[10] Notably, the court first held that the regulation did not create a private right of action. August 4, 1997 Memorandum Opinion (pp. 30-32). On reargument, however, it decided that there was no need to resolve the issue at the preliminary injunction stage. Rodriguez, 177 F.R.D. at 163, n.27. Ultimately, the court came full circle and determined that the regulation is privately enforceable. A 4514.

The question of whether a regulation, standing alone, is privately enforceable in a Section 1983 action has not been decided by this Court. See, King v. Town of Hempstead, 161 F.3d 112, 114 (2d Cir. 1998). It has been held, however, that

> if the regulation defines the content of a statutory provision that creates no federal right under the three-prong test, or if the regulation goes beyond explicating the specific content of the statutory provision and imposes distinct obligations in order to further the broad objectives underlying the statutory provision ... the regulation is too far removed from Congressional intent to constitute a "federal right" enforceable under § 1983.

Harris v. James, 127 F.3d at 1009.

The statutory provisions upon which the district court relied, 42 U.S.C. §§1396a(a)(10)(B) and (17) (A 4514), are insufficient to make 42 C.F.R. §440.230(b) privately enforceable. Section 1396a(a)(17) lacks the requisite specificity because it contains only a generalized requirement that Medicaid plans "include reasonable standards ... for determining eligibility for and the extent of medical assistance." Blessing v. Freestone, 117 S. Ct. at 1362; Suter v. Artist M., 503 U.S. at 363-64; supra. Rather than limiting the States, the Supreme Court has held that this language "confers broad discretion on the States to adopt standards for determining the extent of medical assistance." Beal v. Doe, 432 U.S. at 445.

Similarly, the district court's reliance upon Section 1396a(a)(10)(B) to create a private right of action for the "sufficiency" of services is unpersuasive because this same

provision establishes the "comparability" principle. The court failed to explain how the same, or similar, words could mean both that services must be "sufficient" for an individual and "comparable" between groups. If the same statutory language gives rise to regulations with disparate meanings, it is readily apparent that at least one regulation "goes beyond explicating the specific content of the statutory provision and imposes distinct obligations." See Harris, 127 F.3d at 1009. [11]

Moreover, the district court's primary authority for finding that the regulation was privately enforceable, Wilder v. Virginia Hospital Ass'n, 496 U.S. 519 (1990), is readily distinguishable. Wilder did not address 42 C.F.R. 440.230(b) or its predicate statutes and dealt instead with a Medicaid requirement governing the determination of provider rates. It stands to reason that considerably more statutory guidance would be reguired in regulating the sufficiency of Medicaid services rather than the rate of payment. Moreover, the Supreme Court has suggested that the term "reasonable" creates ambiguity when referring to the overall sufficiency of program benefits, as opposed to more limited matters such as rents or provider fees. Suter v. Artist M., 503 U.S. at 1366-70.

Unlike Wilder, Sobky v. Smoley, 855 F. Supp. at 1144,

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[11] The language in 42 U.S.C. §1396a(a)(10)(B) ("amount, duration, or scope") actually differs from the language in 42 C.F.R. §440.230(b) ("amount, duration and scope"). In contrast, 42 C.F.R. §440.240 directly paraphrases the requirements of Section 1396a(a)(10)(B).

undertook an analysis of the nature of State obligations under 42 C.F.R. §440.230(b). It noted that courts have conflicting views about those obligations and suggested that the regulation was too ambiguous to be enforceable in a section 1983 action because in discerning what is sufficient to reasonably achieve the purpose of a service, "reasonable is never defined." Sobky v. Smoley, 855 F. Supp. at 1142-43. See also, Graus v. Kaladjian, 2 F. Supp.2d 540, 544 (S.D.N.Y. 1998)(dismissing claim under 42 C.F.R. §435.930(b) because regulations expressing "in vague and general forms the overall goals of the program [are] a patently insufficient base on which to ground a private enforcement action under § 1983.").

Most cases interpreting 42 C.F.R. 440.230(b) have held that services are reasonably "sufficient in amount, duration and scope" if they meet the needs of most Medicaid recipients. See, e.g. Charleston Memorial Hospital v. Conrad, 693 F.2d 324, 330 (4th Cir. 1982) (upholding Medicaid inpatient hospital coverage meeting needs of 88% of recipients); Curtis v. Taylor, 625 F.2d 645 (5th Cir. 1980), modified, 648 F.2d 946 (5th Cir. 1980) (upholding limitation on coverage of monthly physician visits which met needs of 96% of the Medicaid population); King v. Sullivan, 776 F. Supp. 645, 652-3 (D.R.I. 1991) (State met its burden to provide "sufficient" services by offering mentally retarded placement in a public facility as opposed to smaller private or group home facilities). Thus, courts have regarded 42

C.F.R. 440.230(b) as a yardstick to measure the systemwide performance of the program rather than the sufficiency of benefits provided for particular individuals.[12] This conception of the regulation is inconsistent with the notion that it creates a private right of action.

In all events, even if this regulation were privately enforceable, the State did not violate it. The district court ignored the element of discretion that is inherent in the description of services that are "sufficient in amount, duration and scope to reasonably achieve" their purpose, replacing it with an inflexible duty to meet the needs of each and every recipient in full measure. Under the district court's view, the State has an obligation to fund independent "safety monitoring" for each and every Medicaid patient desiring that care regardless of cost or risk. The Supreme Court has ruled, however, that:

> Medicaid programs do not guarantee that each recipient will receive that level of health care precisely tailored to his or her particular needs. Instead, the benefit provided through Medicaid is a particular package of health care services, such as 14 days of inpatient coverage.

Alexander v. Choate, 469 U.S. at 303. The State is not required under an amorphous notion of "adequacy," to fund the best possi-

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[12] The remedy for a state's systemic non-compliance with its Medicaid Plan is for the Secretary of (HHS) to take appropriate action to compel compliance under 42 U.S.C. § 1396c. Plaintiffs failed to demonstrate below that HHS ever found it necessary to take any action, or even investigate, the defendants' alleged failure to provide independent safety monitoring, although the State brought this issue to the attention of HHS in 1996. A 3737-38.

ble care for the needy, equal or superior to that obtainable by those who pay for their own care. Id.

Moreover, plaintiffs failed to prove that the State does not provide necessary care for the great majority of recipients of Medicaid personal care services. There were only a few isolated instances in which individuals allegedly were denied home care because TBA did not assess "safety monitoring as a separate task" and no showing was made that these individuals were denied access to alternative programs.[13] Indeed, the district court quoted a State study indicating that only a small percentage of home care recipients in the City wandered excessively, and in "upstate" counties an even smaller group of recipients suffered from senility or Alzheimer's disease. Rodriguez, 177 F.R.D. at 153, n. 9. Even if it were deemed a "denial" of "adequate" care to offer such patients nursing home placement rather than home care, that would not constitute a violation of the "amount, duration and scope" regulation because the needs of the vast majority recipients would still be met. Charleston Memorial Hospital v. Conrad, 693 F.2d at 330.

Furthermore, the district court did not cite any authority supporting its conclusion that 42 C.F.R. §440.230(b) precludes the State from offering equivalent care in alternative programs. Here, plaintiff's own expert conceded that "all of the activities of daily living" supported by personal care services can be

[13] In fact, when the evidentiary record closed in late 1998, plaintiffs submitted no evidence that the "safety monitoring" class was injured during the two-year pendency of this action, despite the absence of any injunctive relief. A 4313-14.

addressed in an institutional environment. A 960. The fact that it is theoretically possible, with sufficient expenditures, to provide nearly any form of care at home does not warrant requiring the State to fund such coverage.

B. 42 C.F.R. 440.230(c) Is Inapplicable To Optional Services Such As Personal Care Services

The district court further erred in relying upon 42 C.F.R. §440.230(c), which expressly pertains only to required services, not optional services such as personal care services:

> The Medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service under §§ 440.210 and 440.220 to an otherwise eligible recipient solely because of the diagnosis, type of illness or condition.

(Emphasis added). See, e.g., Ledet v. Fischer, 548 F.Supp. 775, 786 (M.D. La. 1982) (finding section 440.230(b) inapplicable to eyeglasses, an optional service). Compare Hern v. Beye, 57 F.3d 906, 636 (10th Cir. 1995) (abortion considered a "mandatory" service since it comes within mandatory care categories such as "physicians' services"). A critical point that the district court continuously missed is that the personal care program is an optional service, intended as an alternative to existing residential health care programs when "cost effective and appropriate." SSL §365-a(2)(e).[14]

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[14] The court's confusion was surprising in view of its reference to an interpretive guideline issued by HCFA (A 4515) clearly stating that this regulation applies to mandatory benefits under Medicaid: "[a] State may not impose arbitrary limitations on mandatory services, such as home health services, based solely on diagnosis, type of illness, or condition. (42

Even if this regulation were applicable to personal care services, however, the Court erred nonetheless in holding that the State illegally "discriminates" on the basis of medical diagnosis. A 4517. Indeed, White v. Beal, upon which the district court relied, expressly recognized that "the regulations permit discrimination in benefits based upon the degree of medical necessity." 555 F.2d at 1152.[15] Furthermore, 42 C.F.R. §440.230(d) explicitly authorizes states to "place appropriate limits on [any] service based on such criteria as medical necessity or on utilization control procedures." Charleston Memorial Hospital v. Conrad, 693 F.2d 324, 330 (4th Cir. 1982) (states may allow cost considerations to influence coverage decisions). Plaintiffs failed to demonstrate that it was "medically necessary" to care for mentally impaired indi-viduals -- when continually at risk to themselves because they no longer are aware of their surroundings -- in the personal care services program.

Even if it were possible to provide home care for every

C.F.R. §440.230(c)." (Annexed to plaintiffs' Supplemental Memorandum, dated January 8, 1999). Personal care services "differ markedly" from home health services and also involve non-medical determinations, including nursing and social assessments. Kuppersmith v. Dowling, 1999 WL at *4-5, FN.

[15] The lower Court's reliance upon White v. Beal, 555 F.2d 1146, 1152 n.6 (3d Cir. 1977), also is misplaced because that case implied that optional services in a State Medicaid plan are deemed "required" because a State "must adhere to its plan." This Court has held that State plan requirements do not become enforceable as federal law simply because a State plan is "required" under the federal Medicaid Act. Concourse Rehabilitation & Nursing Center v. Wing, 150 F.3d 185, 189 (2d Cir. 1998).

Medicaid recipient desiring it, regardless of their medical condition, the Supreme Court has held that "nothing in the [Medicaid] statute suggests that participating states are required to fund every medical procedure within the delineated categories of medical care." Beal, 432 U.S. at 445. This court has similarly expressed the view that Medicaid does not require States to cover each and every service deemed "medically necessary" and that requiring them to do so will only threaten their ability to provide any optional services at all. Desario v. Thomas, 139 F.3d 80, 94-95 (2d Cir. 1998), (upholding limitation on coverage of durable medical equipment in home health services program) vacated on other grounds, sub. nom., Slekis v. Thomas, 119 S. Ct. 864 (1999).

The State has reasonably limited the personal care services program to those individuals whose medical conditions enable them to benefit from the service safely, and without excessive cost. A 1821-22. Altering the program to provide unlimited "safety monitoring as a task" will destroy the program's limitations, since virtually every person with a significant mental impairment would then arguably be entitled to continuous daily home care. Plaintiffs conceded this very point below. A 2026-27. Yet, they never showed that an appreciable number of such persons were actually injured or deprived of meaningful access to home care under the TBA methodology.

POINT III

THE DISTRICT COURT FAILED TO ACCORD THE STATE DEFERENCE IN THE STATE'S INTERPRETATION OF ITS OWN MEDICAID PLAN

Finally, the district court also failed to accord the State the required deference in the State's interpretation of its own Medicaid plan. Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984); Skandalis v. Rowe, 14 F.3d 173, 179 (2d Cir. 1994) (a court must defer to an administrative agency's interpretation of a statute that it administers unless the agency's interpretation is unreasonable); Perry v. Dowling, 95 F.3d 231, 236 (2d Cir. 1996) (same).

The plan does not require "safety monitoring" as a separate personal care task. SSL § 365a(2)(c). Nevertheless, the district court repeatedly disregarded the State's interpretation of the plan (see e.g., Rodriguez, 117 F.R.D. at 147-8, 157-9), and found to the contrary, even though "safety monitoring is not one of the nutritional and environmental support tasks listed in the regulations. 18 NYCRR §505.14(a)(6)(i)(a) and (ii)(a). In so doing, the court relied upon 18 NYCRR §505.14(a)(6)(ii)(b)(1)(v), a regulation which had been invalidated in Deluca v. Hammons, 927 F. Supp. 132 (S.D.N.Y. 1996), and which never required "safety monitoring as a separate task," but merely permitted local districts to allocate additional hours for applicants when "monitoring of the patient's safety is required as part of a plan of care for a non-self directing patient." Rodriguez v. DeBuono, 177 F.R.D. at 159 n.19.

Moreover, the invalidated regulation was clearly limited to the circumstances delineated in 18 NYCRR §505.14(a)(4)(ii), which provide that:

> Patients who are nonself-directing, and who require continuous supervision and direction for making choices about activities of daily living shall not receive personal care services, except under the following conditions:
>
> ... supervision or direction is provided on an interim or part-time basis as part of a plan of care in which the responsibility for making choices about daily living is assumed by a self-directing individual ...

The State rationally interprets these regulations as contemplating that a non-self directing person is eligible for personal care only when another person, typically a family member or friend, is available; not as mandating the provision of continuous supervision and direction by personal care services attendants. Indeed, in 1992, the State issued administrative directive 92 ADM-49 confirming this point.[16]

The directive clearly states that "[s]upervision and direction of non-self-directing recipients is not an appropriate role for individuals providing personal care services" (A 3681), and suggests that consideration should be given to whether a family member or friend has "substantial daily contact with the recipient in the recipient's home" and whether that individual "is

[16] The directive provides in part: "Personal care services may only be provided to non-self-directing recipients if the responsibility for direction is assumed by another individual or an outside agency and any needed supervision or direction is provided on a part-time or interim basis by that individual or agency." A 3680.

physically present in the home at times throughout the day or night as necessary to assure the safety of the recipient." A 3681.

The district court, however, "disagreed" with the State's interpretation of its own regulations. It decided that the State intended to fund home care for purposes of continuous supervision or "safety monitoring as a separate task." Rodriguez, 177 F.R.D. at 158.[17] This was plain error. Lyng v. Payne, 476 U.S. 926, 939 (1986) ("an agency's construction of its own regulation is entitled to substantial deference"); Skandalis v. Rowe, 14 F.3d at 178 ("when an agency construes its own regulations ... deference is particularly appropriate").[18]

The district court also misconstrued the State's own studies of its personal care services program. Because a 1993 study of the program in the New York City district referenced the term "safety monitoring", the court held that this was a separate program task, while ignoring a companion study of districts in the rest of the State which contained no reference to safety

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[17] Ironically, the district court observed that "the defendants' interpretation of the Medicaid Act may be entitled to some deference on appeal," although it afforded the State's interpretation of its own Medicaid plan no deference at all. October 23, 1997 Hearing Transcript, p. 5.

[18] The district court's efforts to enforce its views of State laws and regulations also is in apparent conflict with the Eleventh Amendment. The Supreme Court has stated that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct with state law." Pennhurst v. Halderman, 104 S. Ct. 900, 911 (1984).

monitoring. A 3753-93. The court also overlooked the testimony of various program administrators that "safety monitoring" is not considered a separate function, but only an aspect of assisting in task performance. A 1197-98, 1301, 1513, 1702-03, 1718.

Even if the State's policy had changed over the years, the district court erred nonetheless in depriving the State of any flexibility in administering its personal care services program.[19]

> Where a statute leaves open a number of possible interpretations . . . . [a]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.

Liegl v. Webb, 802 F.2d 623, 628 (2d Cir. 1986), citing Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 863-64 (1984).

Obviously, the government must be able to adjust its policy over time to respond to changing circumstances. Uncontested evidence showed that in recent years the State's home care program was "ballooning" uncontrollably (A 258-62) and that, in fact, it had become vastly more expensive than that of any other state. A 201, 262.

In addition to failing to accord deference to the State,

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[19] The district court relied upon a statement by the state's witness that "at one time, I guess" safety monitoring was considered a separate task. Rodriguez, 177 F.R.D. at 159, n.19. In any event, that witness made it clear that the state no longer considers this part of the program. A 1301.

the district court avoided the plain meaning of HCFA's statement (A 3745) that safety monitoring as a separate task is not a contemplated personal care service and thus failed to accord deference to HCFA. The court speculated that "most patients in need of safety monitoring also need assistance with [regular tasks]" Rodriguez, 177 F.R.D. at 160, and chose to ignore the obvious point: the independent monitoring or supervision of a patient at continual risk to him or herself is not covered under this program because it is not assistance with personal care tasks. A 1297, 1301, 1384-85.

It is not the judiciary's role to substitute its judgement for the State's in configuring a Medicaid program. See King v. Fallon, 801 F.Supp. 925, 928 (D.R.I. 1992) (the issues raised by caring for the mentally retarded in large institutions or smaller residential facilities are "policy decisions ... entrusted to the [state], not the federal judiciary."). In seeking to refashion the State's Medicaid personal care program the district court improperly invaded the prerogative of state officials. As the Supreme Court noted in Dandridge v. Williams, 397 U.S. 471, 487 (1990), "the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business" of the judiciary, and the Constitution does not empower it "to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds. . ."

CONCLUSION

For all of the foregoing reasons, the district court's order and judgment should be reversed and the permanent injunction should be vacated.

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Respectfully submitted,

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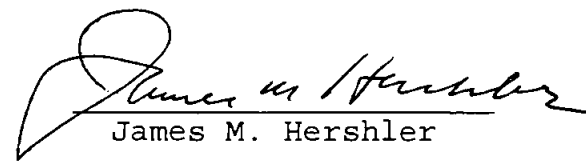
CERTIFICATION OF COMPLIANCE

I, James M. Hershler, counsel for State Defendants-Appellants Whalen and Wing, hereby certify that the within brief is in compliance with FRAP 32(a)(7) in that: (1) the brief utilizes non-proportional (monospaced) typeface with no more than 10.5 characters per inch, and (2) the brief contains 7855 words.



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