

Appellant's Brief

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97-9152



[97-9176 (CON), 97-9178 (CON),
97-9186 (CON), 97-9206 (CON), 97-9204 (XAP)]

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
GOUVATOS; and SIDONIE BENNETT; individually and on behalf of all others similarly
situated,

Plaintiffs-Appellees-Cross-Appellants,

-and-

RUVIM ASELOD,

Intervenor-Plaintiff-Appellee-Cross-Appellant,

-against-

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,
Defendants-Appellants-Cross-Appellees,

-and-

CITY OF NEW YORK, COMMISSIONER OF THE WESTCHESTER COUNTY
DEPARTMENT OF SOCIAL SERVICES, COMMISSIONER OF SUFFOLK COUNTY
DEPARTMENT OF SOCIAL SERVICES, IRENE LAPIDEZ, COMMISSIONER OF
NASSAU COUNTY DEPARTMENT OF SOCIAL SERVICES,

Intervenor-Defendants-Appellants-Cross-Appellees.

BRIEF FOR COMMISSIONER, WESTCHESTER COUNTY
DEPARTMENT OF SOCIAL SERVICES

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-and-
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BRIAN WING, Acting Commissioner of the New York State Department of Health,

Defendants-Appellants-Cross-Appellees,

-and-
COMMISSIONER, NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES;
COMMISSIONER, NASSAU COUNTY DEPARTMENT OF SOCIAL SERVICES;
COMMISSIONER, SUFFOLK COUNTY DEPARTMENT OF SOCIAL SERVICES;
COMMISSIONER, WESTCHESTER COUNTY DEPARTMENT OF SOCIAL SERVICES,

Intervenor-Defendants-Appellants-Cross-Appellees.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Plaintiffs-Appellees are Medicaid recipients and applicants of personal care services throughout the State of New York. Plaintiffs-Appellees originally commenced this class action against 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 to challenge the design and implementation of task-based programs ("TBA") used throughout New York State to determine the amount of personal care services provided to eligible Medicaid applicants and recipients. In addition, Plaintiffs-Appellees moved for a preliminary injunction in the United States District Court to, *inter alia*, enjoin "defendants 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 and enjoining defendants from permitting the continued use of task based assessment instruments and programs..."

The jurisdiction of the United States District Court for the Southern District of New York was invoked pursuant to 28 U.S.C. §1343, 29 U.S.C. §794, 42 U.S.C. §1983, 42 U.S.C. §12101 *et seq.* and 42 U.S.C. §§1396 *et seq.*

By amended opinion and order dated August 21, 1997¹, the United States District Court for the Southern District of New York (Scheidlin, J.) issued a preliminary injunction and directed the Intervenor-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 authorized for applicants and recipients. On September 10, 1997, the Intervenor-Defendant City of New York Department of Social Services filed its Notice of Appeal. Intervenor-Defendant, Westchester County Department of Social Services, filed a Notice of Appeal in the District Court on September 16, 1997. On September 24, 1997, Plaintiffs-Appellees also filed a Notice of Appeal. On September 26, 1997, Nassau County Department of Social Services filed its Notice of Appeal.

The jurisdiction of this Court was invoked pursuant to 28 U.S.C. §1292(a)(1).

¹ The United States District Court originally decided the motion for a preliminary injunction in its Memorandum Order dated August 4, 1997, however that Order was subsequently withdrawn and superseded by the Amended Opinion and Order dated August 21, 1997.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Did the District Court abuse its discretion by issuing a preliminary injunction and directing that the Intervenor-Defendants 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 authorized for applicants and recipients of Medicaid home care?

The District Court abused its discretion by issuing a preliminary injunction and directing that the Intervenor-Defendants 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 authorized for applicants and recipients of Medicaid home care.

STATEMENT OF THE CASE

Under New York State law, the "amount, nature and manner of providing medical assistance" provided to Medicaid recipients is determined by the local social services district. New York State Social Services Law ("SSL") sections 62(1) and 365-a. See Amended Opinion and Order, p. 4. In other words, each of the local social services districts uses its own discretion to manage its programs in accordance with the guidelines of Federal and State law and regulations. SSL 62(1), 365-a and 18 N.Y.C.R.R. section 505.14; see also Amended Opinion and Order, p.4.

There are various programs utilized throughout the State of New York to provide for the care of Medicaid recipients.

(Tr. 788²). One type of program provides personal care services to certain qualified Medicaid recipients. (Tr. 783).

Specifically, personal care services assist individuals with personal hygiene and environmental and nutritional support tasks in order to maintain them in their home. (Tr. 783). For example, personal care services include assisting Medicaid recipients with daily activities such as cooking, feeding, dressing, bathing, shopping, cleaning, or toileting. (Tr. 783).

² Numerical references preceded by the letters "Tr." refer to the pages of the transcripts of the preliminary injunction hearing.

Personal care services are only available to certain Medicaid recipients where it is medically necessary in order to maintain the health and safety of the recipient in the home. (Tr. 783).

In order to be eligible for personal care services, the recipient must be medically stable and generally self-directing. (Tr. 783). In other words, the recipient must be able to make decisions concerning daily living activities and understand the consequences of those decisions, or have someone available to assume direction of the recipient's care. (Tr. 783). Each local social services district has the discretion to determine which individuals qualify for these types of services. (Tr. 786-787).

Once an individual is determined to qualify for personal care services, the amount and type of personal care services actually provided to a Medicaid recipient is based on the identified tasks which a personal care aide can perform. (Tr. 787). Task-based assessments ("TBA") analyze the various needs of personal care services recipients and specify the amount of time needed to assist for each particular task. (Tr. 790). Typically, the amount of time required for a task is drawn from standard estimates which are based upon the district's experience in handling many home care patients. The TBA plans generally permit the assessment of time to vary from scheduled estimates in

order to accommodate individual cases which deviate from the average. (Tr. 790).

Many local social services districts utilize TBA programs to reduce wasteful expenditures of limited Medicaid funds by avoiding "down time," periods when an attendant is present at the home but not assisting a patient with recognized personal care needs. (Tr. 791-792); *see also* Amended Opinion and Order, p. 39.

In an effort to provide the most appropriate and cost effective means of delivering personal care services to its Medicaid recipients, Westchester County Department of Social Services ("WCDSS") began utilizing TBAs on or about August 1990, to determine the level and type of care required of Medicaid eligible home care recipients. (Tr. 1245). However, WCDSS only utilizes TBAs after it has made a determination that a particular individual is an appropriate candidate for TBA plan of care. (Tr. 1252). In other words, the individual is determined by WCDSS to be medically stable and generally self-directing and thus eligible for personal care services. (Tr. 1300-1301).

On February 3, 1997, plaintiffs sought a temporary restraining order and preliminary injunction enjoining New York State Department of Social Services (hereinafter "NYSDSS") and the local social services districts from utilizing their task

based assessment (hereinafter "TBA") programs to determine the type of care and type of tasks to be performed by personal care aides for Medicaid recipients. See Findings of Fact and Conclusions of Law, p. 1).

Plaintiffs-Appellees requested that the District Court enjoin the implementation of TBAs throughout all of New York State because of allegations that certain local social services districts were inflexible in the services they allow, and as such jeopardized the health and safety of Medicaid recipients.

The Westchester County Department of Social Services opposed the request for an injunction since it would unjustifiably require WCDSS to amend its determinations without any support whatsoever that Westchester County inappropriately administered the TBA program in the first instance.

The United States District Court held a hearing on the preliminary injunction from April 15, 1997 through June 18, 1997.

After the hearing on the preliminary injunction, the District Court found that (1) the plaintiffs had not proved that the TBA Program was systemically flawed and that it resulted in arbitrary assessments on a systemic level; and (2) that the failure to provide safety monitoring as a separate task violates the federal Medicaid Act. See Amended Opinion and Order, p.49).

In its Amended Opinion and Order, the District Court also ordered *inter alia*, that the Westchester County Department of Social Services include 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. See Amended Opinion and Order, p. 56.

On August 4, 1997, the United States District Court for the Southern District of New York (Scheindlin, J.) issued a Memorandum Opinion which was subsequently amended by the Amended Opinion and Order which was entered on August 21, 1997. On September 10, 1997, the Intervenor-Defendant City of New York Department of Social Services filed its Notice of Appeal. Intervenor-Defendant, Westchester County Department of Social Services, filed a Notice of Appeal in the District Court on September 16, 1997. On September 24, 1997, Plaintiffs-Appellees also filed a Notice of Appeal. On September 26, 1997, Nassau County Department of Social Services filed its Notice of Appeal.

It is from this Amended Opinion and Order which the Commissioner of the Westchester County Department of Social Services now appeals.

A SUMMARY OF THE ARGUMENT

The United States District Court abused its discretion by issuing a mandatory injunction against the Westchester County Department of Social Services when there was no evidence whatsoever that Plaintiffs-Appellees would be irreparably harmed unless safety monitoring was included as a separate task for personal care services. In addition, there was no evidence that any individual within Westchester County was not receiving the appropriate care necessary to adequately meet their needs. Consequently, the District Court's Amended Opinion and Order issuing a mandatory injunction should be reversed.

ARGUMENT

THE DISTRICT COURT ABUSED ITS DISCRETION IN ISSUING A PRELIMINARY INJUNCTION WHEN PLAINTIFFS-APPELLEES FAILED TO MEET THE REQUIREMENTS

Where a preliminary injunction would stay governmental action taken in the public interest, pursuant to a statutory or regulatory scheme, the movant must show (a) irreparable harm and, either, (b) likelihood of success on the merits or (c) the presence of sufficiently serious questions going to the merits as to make them fair ground for litigation, together with a balance of hardships. *Sweeney v. Bane*, 996 F.2d 1384, 1388 (2d Cir. 1993); *Plaza Laboratories, Inc. v. Perales*, 878 F.2d 577, 580 (2d Cir. 1989). In addition, if the preliminary relief sought is the same relief that is sought ultimately, the movants must not only show a likelihood of success on the merits, but a "substantial" likelihood of success on the merits. *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1026 (2d Cir. 1985). Finally, where an injunction is deemed mandatory and will upset the "status quo", Courts have held an injunction must issue "only upon a 'clear showing' that the moving party is entitled to the relief requested". *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985) (citing *Flintkote Co. v. Blumenthal*, 469 F. Supp. 115, 125-

126 (N.D.N.Y. 1979) *aff'd* 596 F.2d 51 (2d Cir. 1979)). As will be discussed in further detail below, not only have Plaintiffs-Appellees failed to meet the requirements necessary for a mandatory injunction, but the District Court has abused its discretion by granting the mandatory injunction to Plaintiffs-Appellees in the instant matter.

1. THE DISTRICT COURT ABUSED ITS DISCRETION IN
ISSUING A PRELIMINARY INJUNCTION WHEN
PLAINTIFFS-APPELLEES FAILED TO SHOW THAT THEY WOULD
SUFFER IRREPARABLE INJURY ABSENT A GRANT OF INJUNCTIVE RELIEF.

As indicated above, the first element that Plaintiffs-Appellees are required to prove before an injunction may even be considered is irreparable harm. *Catanzano by Catanzano v. Dowling*, 847 F. Supp. 1070, 1080 (W.D.N.Y. 1994), *aff'd*, 60 F.3d 113 (2d Cir. 1995). The injury or threat of injury must be "real and immediate", not merely an abstraction. *Biggs v. Block*, 629 F. Supp. 1574, 1577 (E.D.N.Y. 1986) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102, 103 S.Ct. 1660, 1665 (1983)). The failure to prove a real and immediate injury or threat of injury requires that the request for a preliminary injunction be dismissed. See *Ellen S. v. Rhodes*, 507 F. Supp. 734, 740 (S.D. Ohio 1981) (request for preliminary injunction dismissed when

based solely upon speculative and general assertions that "dangerous" hospital staff reductions were imminent).

In the instant matter, Plaintiffs-Appellees have failed to show that they will be irreparably harmed absent the granting of a preliminary injunction against all of the Intervenor-Defendant counties. Plaintiffs-Appellees allege that there are thousands of individuals throughout the State of New York who must be protected by the injunctive relief sought (and obtained) in this action. In support of their position, Plaintiffs-Appellees make sweeping allegations that all task-based assessments (TBA) throughout the State of New York promote arbitrary determinations of home care hours and, consequently, deprive recipients of adequate care.

However, other than the individual cases of five personal care services recipients located in Queens and Nassau County, Plaintiffs-Appellees make no showing whatsoever regarding the specific task-based programs located elsewhere in New York State.³ Plaintiffs-Appellees have failed to analyze the specifics of the individual social services district plans to show how they are allegedly inadequate in providing the necessary

³ Pursuant to New York State Law, each of the local social services districts has the discretion to manage its own personal care services program in accordance with Federal and New York State Law. New York State Social Services Law §62(1), 365-a; 18 N.Y.C.R.R. §505.14.

care to Plaintiffs-Appellees absent a preliminary injunction. Plaintiffs-Appellees did not even allege, let alone prove, that the individual cases of the named plaintiffs are typical of a state-wide policy. Without any of the aforementioned proof of the irreparable harm that will necessarily occur absent injunctive relief, Plaintiffs-Appellees have failed to comply with the first element necessary for a preliminary injunction. Mere conjecture that harm may occur in any county using a TBA plan of care is insufficient to grant standing to obtain injunctive relief. *Biggs v. Block*, 629 F. Supp. 1574, 1578 (E.D.N.Y. 1986); *Schroedel v. New York University Medical Center*, 885 F. Supp. 594, 599-600 (S.D.N.Y. 1995).

The fact is that TBA plans of care have been successfully utilized in Westchester County for years. There is no claim that long-standing TBA plans of care have recently changed, or any demonstration of a sudden, compelling need for a preliminary injunction against Westchester County at this point in time. The lack of an emergent development strongly suggests that the *status quo* has been satisfactory. For Plaintiffs-Appellees to now argue that an injunction against all of the counties involved is necessary to protect them from harm is simply disingenuous.

Moreover, it was an abuse of discretion for the District Court to entertain the motion for a preliminary injunction against all of the defendants where Plaintiffs-Appellees have failed to offer proof that the "sweeping" mandatory injunctive relief requested was necessary given the facts introduced. In addition, the District Court also abused its discretion by granting a mandatory preliminary injunction against all of the Intervenor-Defendants when Plaintiffs-Appellees utterly failed to provide a *clear showing* that they were entitled to the drastic relief requested. Consequently, this Court should reverse the Amended Opinion and Order dated August 21, 1997, of the United States District Court insofar as it directed Defendants-Intervenor such as Westchester County to include safety monitoring as a separate task on their TBA forms, to assess the need for safety monitoring as a separate task and to calculate any minutes allotted for safety monitoring as part of the total personal care services authorized for applicants and recipients.

2. THE DISTRICT COURT ABUSED ITS DISCRETION IN
ISSUING A PRELIMINARY INJUNCTION WHEN
PLAINTIFFS-APPELLEES FAILED TO SHOW THE
LIKELIHOOD OF SUCCESS ON THE MERITS.

Not only have Plaintiffs-Appellees failed to prove that they would be irreparably harmed absent the grant of a preliminary injunction, Plaintiffs-Appellees have also failed to show a substantial likelihood of success on the merits.

Plaintiffs-Appellees contend that the failure to provide safety monitoring as a separate task discriminates against mentally disabled applicants and recipients in violation of federal Medicaid law. However, neither Federal nor State law mandates safety monitoring as a task at times when personal care services are not being performed. The only applicable Federal and State requirement regarding Medicaid services is that such services be "sufficient in amount, duration and scope" in order to adequately meet the needs of most recipients. *King by King v. Sullivan*, 776 F. Supp. 645, 652-653 (D.R.I. 1991); *Curtis v. Taylor*, 625 F.2d 645 (5th Cir. 1980), mod., 648 F.2d 946 (5th Cir. 1980); *Virginia Hospital Association v. Kenley*, 427 F. Supp. 781, 785-786 (E.D. Va. 1977). In addition, only those individuals who are found to be medically stable and generally self-directing are eligible for personal care services in the first instance. Plaintiffs-Appellees herein have failed to

demonstrate that TBA plans of care do not adequately meet the needs of its recipients in Westchester County.

The decision not to include safety monitoring as a separate task with respect to personal care services, is clearly an administrative decision which was made by each of the local social services districts. In reviewing such an administrative decision, the District Court is limited to deciding whether the action is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 844 (1984); *Visser v. Taylor*, 756 F.Supp. 501 (D.Kan. 1990). If there is a reasonable basis for the administrative decision, then a Court should defer to the administrative agency's determination. See generally, *Multicare Medicare Center v. State of Washington*, 768 F.Supp. 1349 (W.D.Wash. 1991). A Court is not empowered to substitute its judgment for that of the agency. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 405, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).

In the instant matter, the District Court abused its discretion by failing to even consider the particular determinations made by each of the local social services districts with respect to establishing a TBA plan of care for

individuals within their jurisdiction. Plaintiffs-Appellees failed to produce any compelling evidence that any alleged inadequacies in home care assessments were a direct result of the failure to include safety monitoring as a separate task. Therefore, the District Court had no basis to rule that Medicaid services in Westchester County are not "sufficient in amount, duration and scope" and do not adequately meet the needs of most recipients when the District Court has not even received any evidence to the contrary.

Moreover, by granting a preliminary injunction against all of the defendants, the District Court, at the behest of the Plaintiffs-Appellees have substituted their judgment for that of the local social services districts such as the Westchester County Department of Social Services, by ordering a new method to assess personal care services.

Accordingly, since Plaintiffs-Appellees have failed to offer sufficient proof that they are likely to succeed on the merits against all of the local social services districts such as Westchester County, the District Court abused its discretion by issuing a mandatory injunction against all of the defendants.

3. THE DISTRICT COURT ABUSED ITS DISCRETION
IN ISSUING A PRELIMINARY INJUNCTION WHEN
THE WEIGHING OF THE EQUITIES IS NOT
IN FAVOR OF THE PLAINTIFFS-APPELLEES.

In addition to not meeting its burden on the issues of irreparable harm and success on the merits, Plaintiffs-Appellees have failed to demonstrate a balance of the equities.

The equities balance in favor of the continuation of the current TBA plan of care in Westchester County. In the event, this Court continues this mandatory injunction, certain recipients currently receiving personal care services may no longer be qualified to receive such services. In addition, any individuals who were not receiving personal care services because they were not medically stable and generally self-directing will still not be receiving personal care services despite the inclusion of a separate task for safety monitoring.

The mandatory injunction would clearly cause far greater harm than good because it would require Westchester County, which uses a task-based assessment plan of care, to abandon it without any evidence whatsoever that it is not working. This hardly is in keeping with the purpose of interlocutory relief, which is to maintain the *status quo* until a decision can be reached on the

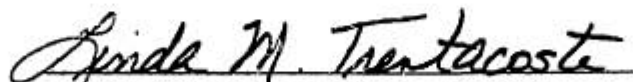
merits of the case. "Courts are traditionally and justifiably reluctant to grant interim relief which disrupts the ability of a governmental agency to perform its duties." *Intercommunity Relations Council of Rockland County Inc. v. U.S. Department of Health and Human Services*, 859 F. Supp. 81, 83 (S.D.N.Y. 1994). Accordingly, this Court should reverse the District Court's Amended Opinion and Order.

CONCLUSION

For the foregoing reasons, the Westchester County Department of Social Services respectfully requests that an order be entered reversing the Amended Opinion and Order dated August 21, 1997, of the United States District Court for the Southern District of New York (Scheindlin, J.) insofar as it issued a preliminary injunction and directed the Intervenor-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 authorized for applicants and recipients.

Date: White Plains, New York
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