

Appellant's Brief

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97-9152



97-9152(L) 97-9176 (con), 97-9178 (con),
97-9204 (xap), 97-9206 (con),

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PLEASE RETURN TO ROOM UNITED STATES COURT OF APPEALS
1802 FOR THE SECOND CIRCUIT

JUANA RODRIGUEZ, by her son and next friend, WILFREDO RODRIGUEZ,
AMFLIA RUSSO; MARY WIENBALD by her daughter and next
friend, SUSAN DOWNES; CRISTOS GOVATSOS SIDONIE BENNETT;
individually and on behalf of all other similarly situated,

Plaintiffs-Appellees-Cross-Appellants,

RUVIN ASELRD,

Intervenor-Plaintiff-Appellee-Cross-Appellant

-against-

BARBARA A. DEBUONO, Commissioner of the New York State
Department of Health, BRING WING, Acting Commissioner of the
New York State Department of Social Service,

Defendants-Appellants-Cross-Appellees

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

Intervenor-Defendants-Appellants-Cross-Appellees

BRIEF OF THE COMMISSIONER OF THE
SUFFOLK COUNTY DEPARTMENT OF SOCIAL SERVICES

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(con), 97-9178 (con), 97-9186 (con),
97-9206 (con), 97-9204 (xap)



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMELIA RUSSO; MARY WIENBALD by her daughter and next
friend, SUSAN DOWNES; CHRISTOS GOUVATSOS SIDONIE BENNETT;
individually and on behalf of all other similarly situated,
JUANA RODRIGUEZ, by her son and next friend, WILFREDO
RODRIGUEZ,

Plaintiffs-Appellees-Cross-Appellants,

RUVIN ASELOD,

Intervenor-Plaintiff-Appellee-Cross-Appellant

-against-

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

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BARBARA A. DEBUONO, Commissioner of the New York State
Department of Health, BRING WING, Acting Commissioner of the
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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Defendant Intervenor-Appellant SUFFOLK COUNTY DEPARTMENT OF SOCIAL SERVICES adopts the Statement of Subject Matter and Appellate Jurisdiction as submitted by defendant Intervenor Appellant WESTCHESTER COUNTY DEPARTMENT OF SOCIAL SERVICES¹, and adds the following:

Intervenor-Defendant SUFFOLK COUNTY DEPARTMENT OF SOCIAL SERVICES, filed a Notice of Appeal in the District Court on September 25, 1997.

¹Pursuant to the pre-argument conference held on October 7, 1997 with staff counsel, Stanley Bass, Defendant Intervenor-Appellant Suffolk County Department of Social Services is submitting a truncated brief, adopting that submitted by the Westchester Commissioner of Social Services.

STATEMENT OF 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

Defendant-Intervenor-Appellant, SUFFOLK COUNTY DEPARTMENT OF SOCIAL SERVICES, adopts the Statement of the Case as submitted by Defendant-Intervenor-Appellant WESTCHESTER COUNTY DEPARTMENT OF SOCIAL SERVICES, and adds the following:

Suffolk County Department of Social Services has been successfully operating its Personal Care Services Program which uses task based assessments since 1991 and has never received a negative patient outcome (Tr. 1353). Negative patient outcome is defined generally as a report that something detrimental happened to a client because of a nurse's underassessment of task based hours (Tr. 1354).

The medical, social and fiscal assessments required in the evaluation of each patient in Suffolk County are performed by nurses who have attained the civil service title of "Medical Services Specialist" which title requires a Bachelors of Science in Nursing as well as a minimum of two (2) years experience in home care (Tr. 1336).

Most of the nurses in Suffolk County who evaluate patients for task based assessment have ten (10) years experience in home care and most of them have Master's Degrees (Tr. 1336).

Suffolk County Department of Social Services opposed the request for an injunction because it would unjustifiably require Suffolk County Department of Social Services to amend its determinations without any support whatsoever that Suffolk County inappropriately administered the Task Based Assessment Program in

the first instance. Notably, not one named plaintiff is from Suffolk County.

In its Amended Opinion and Order dated August 21, 1997, the District Court ordered, inter alia, that the County of Suffolk, 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 September 25, 1997, Intervenor-Defendant, Suffolk County Department of Social Services filed a Notice of Appeal in the District Court.

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

SUMMARY OF THE ARGUMENT

The United States District Court abused its discretion by issuing a mandatory injunction against Suffolk County Department of Social Services when there was no evidence whatsoever that Plaintiff-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 Suffolk 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. 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 statewide mandatory injunction to
Plaintiffs-Appellees in the instant matter.

POINT I

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.

Defendant-Intervenor, Appellant COUNTY OF SUFFOLK DEPARTMENT OF SOCIAL SERVICES adopts the argument submitted by Defendant-Intervenor Appellant WESTCHESTER DEPARTMENT OF SOCIAL SERVICES and adds the following:

Plaintiffs-Appellees have failed to show how they will be irreparably harmed absent the granting of a statewide preliminary injunction. The TBA plans of care have been successfully utilized in Suffolk County since 1991. There is no claim that the long standing TBA plans of care have recently changed, or any demonstrations of a sudden compelling need for a preliminary injunction against Suffolk County. The lack of any plaintiff from Suffolk County or any sudden emergent development strongly suggests that the status quo has been satisfactory. For Plaintiffs- Appellees to now argue that an injunction is necessary to protect a class of citizens is misguided.

Consequently, the Court should reverse the Amended Opinion and Order dated August 21, 1997, of the United States District Court insofar as it directed Defendants-Intervenors such as Suffolk 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 minute allotted for safety monitoring as part of the total personal care services authorized for applicants and recipients.

POINT II

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

Defendant-Intervenor, Appellant, SUFFOLK COUNTY DEPARTMENT
OF SOCIAL SERVICES adopts the argument submitted by Defendant-
Intervenor Appellant WESTCHESTER DEPARTMENT OF SOCIAL SERVICES
and adds as follows:

Plaintiffs-Appellees have failed to show a substantial
likelihood of success on the merits. Plaintiffs Appellees failed
to produce any evidence of any inadequacies in home care
assessment in Suffolk County. Therefore, by issuing a
preliminary injunction, the District Court abused its discretion
and substituted its judgments for that of the local social
services district such as the Department of Social Services of
Suffolk County, by ordering a new method to assess personal care
services.

POINT III

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.

Defendant-Intervenor, Appellant COUNTY OF SUFFOLK,
DEPARTMENT OF SOCIAL SERVICES adopts the argument of Defendant-
Intervenor, Appellant WESTCHESTER COUNTY DEPARTMENT OF SOCIAL
SERVICES and adds as follows:

Suffolk County's TBA Plan of Care was modeled after that of
WESTCHESTER County. Similarly, Suffolk County's recipients of
personal care would likewise be adversely influenced if the TBA
Plan of Care were changed in Suffolk County.

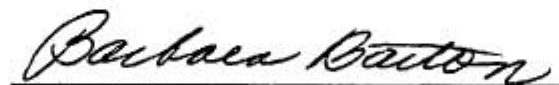
CONCLUSION

For the foregoing reasons, the Suffolk County Department of Social Services respectfully requests that an order be entered reversing Amended Opinion and Order dated August 21, 1997, of the United States District Court of 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.

Dated: Hauppauge, New York
October 24, 1997

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