

Appellant's Reply Brief

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 ASELRD,

Intervenors-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.

REPLY BRIEF FOR COMMISSIONER, WESTCHESTER COUNTY DEPARTMENT OF SOCIAL SERVICES

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REPLY ARGUMENT

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

In their Brief, Plaintiffs-Appellees failed to specifically address the manner in which each social services district throughout the State of New York is inadequately providing the necessary care to Plaintiffs-Appellees and that absent a preliminary injunction, Plaintiffs-Appellees would suffer irreparable harm. For example, the only information Plaintiffs-Appellees proffered with respect to Westchester County was that task-based assessments were first used in Westchester County in 1990.¹ There are other available Medicaid programs offered by Westchester County and other counties throughout the State of New York which should have been considered before the District Court issued a mandatory preliminary injunction. By failing to address these other programs, Plaintiffs-Appellees are implicitly arguing

¹ In fact, in an effort to rectify this clear omission, Plaintiffs-Appellees refer to the Matter of Antonia Valvano. See Plaintiffs-Appellees' Brief, ftnt. 44. However, the document submitted by Plaintiffs-Appellees, regarding the Matter of Antonia Valvano was never part of the record below regarding the preliminary injunction. Consequently, Plaintiffs-Appellees cannot now claim that the District Court properly issued the preliminary injunction in the first instance when it did not consider such information at the time it rendered its decision.

that the personal care services program is the only program provided to Medicaid recipients. Without adequate consideration of all the available programs offered by the various social services districts throughout the State of New York to Plaintiffs-Appellees, Plaintiffs-Appellees have failed to prove that they will suffer irreparable harm absent the grant of a mandatory preliminary injunction. Absent proof of irreparable harm, no preliminary injunction may be issued. See *Catanzano by Catanzano v. Dowling*, 847 F. Supp. 1070, 1080 (W.D.N.Y. 1994), *aff'd*, 60 F.3d 113 (2d Cir. 1995). In other words, 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) *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)). 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). Consequently, the District Court abused its discretion in issuing a preliminary

injunction when Plaintiffs-Appellees failed to meet the requirements.

**PLAINTIFFS-APPELLEES ARE NOT LIKELY TO SUCCEED ON THE MERITS
GIVEN THEIR ARGUMENTS REGARDING "COMPARABILITY" AND
DISCRIMINATION UNDER THE AMERICANS WITH DISABILITIES ACT.**

In their brief, Plaintiffs-Appellees argue that the District Court did not abuse its discretion in issuing the mandatory preliminary injunction because Plaintiffs-Appellees are likely to succeed on the merits. Plaintiffs-Appellees contend that all of the Defendants' actions are in clear violation of the "comparability" provision of the Medicaid Act as set forth in 42 U.S.C. §1396(a)(10)(b).² Despite Plaintiffs-Appellees bold assertions, Defendants actions are not in violation of federal law.

The principle embodied in the "comparability provision" of 42 USC §1396a(a)(10)(b) is that all Medicaid recipients, regardless of the category of their eligibility, are entitled to equally comprehensive care. This provision does not mandate that

² In their brief, Plaintiffs-Appellees' also reference the Americans with Disabilities Act, 42 U.S.C. §12182, to establish their likelihood of success on the merits. See Plaintiffs-Appellees' Brief pg. 47. However, this section of the Americans with Disabilities Act is completely irrelevant to the instant matter because that provision deals expressly with the "prohibition of discrimination by public accommodations." See Plaintiffs-Appellees' Brief pg. 47; see generally *Pappas v. Bethesda Hosp. Ass'n*, 861 F. Supp. 616 (S.D. Ohio 1994) (where individual's claim had nothing to do with the inability to make physical use of services of place of public accommodation). Consequently, no further discussion regarding this section of federal law will be addressed in this Reply Brief.

every Medicaid recipient, regardless of their medical needs, receive the same medical care. Clearly, a program of care that is medically and fiscally appropriate for one individual may not be equally appropriate for another. Accordingly, Defendants have, within their discretion, properly implemented the scope of services to be provided to Medicaid recipients in a manner which is consistent with the Medicaid Act. Such an administrative decision must be accorded due deference by a District Court. *Chevron, U.S.A., Inc. v. Natural Resources Defense, Inc.*, 467 U.S. 837, 81 L.Ed.2d 694, 104 S.Ct. 2778 (1984); *Cosgrove v. Sullivan*, 999 F.2d 630 (2d Cir. 1993).

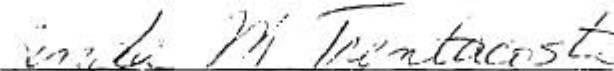
Notwithstanding this fact, the District Court, without considering the manner or extent of the programs available to "individuals similarly situated" to the Plaintiffs-Appellees in Westchester County, substituted its own judgment and determined what scope of services is medically and fiscally appropriate to provide for individuals receiving personal care services. Such action by the District Court was completely inappropriate and a clear abuse of its discretion. Consequently, this Court should reverse the District Court's Order insofar as it issued a mandatory preliminary injunction against the County of Westchester.

CONCLUSION

For all of the reasons set forth in the Appellants' Brief and in this Reply Brief, 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
December 22, 1997

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MARTHA CARTER, being duly sworn, deposes and says:
I am not a party to this action; I am over 18 years of age; I reside in VALHALLA, NEW YORK.

On December 22, 1997, I served a copy of the within **REPLY BRIEF FOR COMMISSIONER, WESTCHESTER COUNTY DEPARTMENT OF SOCIAL SERVICES** in the matter of *Rodriguez, et al. and Aselrod, et al. v. Barbara DeBuono, et al. and Commissioner, New York City Department of Social Services, et al.* upon:

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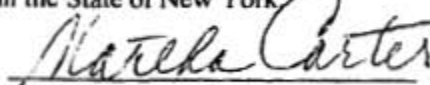
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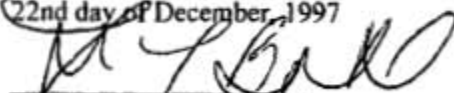
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22nd day of December, 1997


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My Commission Expires By June 6, 1998