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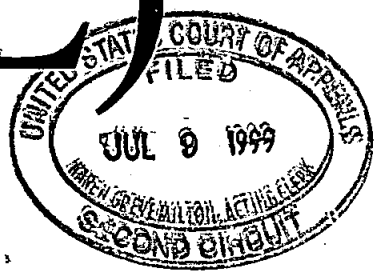

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellees,

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

Intervenor-Plaintiff-Appellee,

v.

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

Intervenor-Defendants-Appellants,

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

Defendants-Appellants.

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

REPLY BRIEF FOR MUNICIPAL INTERVENOR DEFENDANT-APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellants,

MOLLIE PECKMAN, by her son an 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 COUNTY DEPARTMENT OF SOCIAL SERVICES, COMMISSIONER, SUFFOLK COUNTY DEPARTMENT OF SOCIAL SERVICES, THE NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES

Intervenor-Defendants-Appellants,

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

Defendants-Appellants.

MUNICIPAL APPELLANT'S REPLY BRIEF

PRELIMINARY STATEMENT

This brief is submitted by defendant-appellant City of New York ("the City") in reply to the Brief for Plaintiffs-Appellees ("Plaintiffs' Brief"), dated June 6, 1999.

ARGUMENT

INSTITUTING SAFETY MONITORING AS A SEPARATELY ASSESSED TASK WILL FUNDAMENTALLY ALTER THE ESSENTIAL NATURE AND THE FINANCIAL IMPACT OF THE CITY'S PERSONAL CARE SERVICES PROGRAM. THE UNITED STATE'S SUPREME COURT DECISION IN *OLMSTEAD V. L.C. BY ZIMRING* IS THEREFORE NOT APPLICABLE TO THIS CASE.

In *Olmstead v. L.C. by Zimring*, 1999 WL 407830 (U.S.), decided June 22, 1999, the United States Supreme Court recently held that institutionalized patients who are qualified for community-based non-institutional care are entitled to such care, so long as their de-institutionalization does not place an inequitable burden on the State. This decision leaves intact the principle, enunciated in 28 CFR § 35.130(b)(7), that "reasonable modifications" accommodating the disabled do not include steps that "fundamentally alter" a State's services and programs. *Id.* at 12. By contrast to the circumstances in *Olmstead*, instituting safety monitoring as an independent task would fundamentally alter this State's personal care services program, both in terms of the program's essential nature and its financial requirements.

Plaintiffs' insistence to the contrary notwithstanding, personal care services were intended to be provided at home or in a comparable setting. That this is so is demonstrated by the very language relied upon by plaintiffs (Plaintiffs' Br. at 28). 42 USC § 1396d(a)(24)(C) mandates that personal care services be "furnished in a home or other location." The only reasonable construction of this language is that it requires personal care services to be based primarily in the recipient's home or some

comparable single setting, such as a day care program. Plaintiffs, however, seem to interpret this language to mean that personal care services are to be provided anywhere, without restriction. If that were the case, there would have been no reason for the Legislature to include the language at all. The absence of any limitation on location would have been a corollary of the absence of any limiting language.

That personal care services were designed in this State to provide home-based care is further confirmed by 18 NYCRR 505.14(a), which provides that such services "must be essential to the maintenance of the patient's health safety in his or her own home. . . ."

Providing safety monitoring as an independently assessed task would make safety monitoring available to a new population, one whose eligibility for personal care services is based entirely on the need for safety monitoring. Once this population is eligible, personal care services will no longer be based in the home or other comparable setting suitable for tending to the recipient's daily nutritional, environmental or personal care needs. The personal care services provider will be required to accompany the physically able recipient to make sure he or she suffers no harm while engaging in various activities of life in all sorts of settings. The essential nature of personal care services will have been fundamentally altered.

Plaintiffs deny that this population of recipients exists and insists that the need for safety monitoring virtually never occurs independently of the need for personal care tasks.

Plaintiffs' Br. at 30-31. They cite their own experts who testified that Alzheimer patients typically require safety monitoring in conjunction with assessed tasks. (A914, 1109). But this testimony has no bearing on the separate population of physically able recipients who will seek personal care services once the need for safety monitoring -- and safety monitoring alone -- makes them eligible for the program. Nor does the testimony of the City's witness, also cited by plaintiffs (Plaintiffs' Br. at 31), deny this prospect. Her statement that "[t]here are very few clients [receiving 24-hour care] that wouldn't have some personal assistance during nights" refers to patients who are eligible for the program under the current system (A1549). The statement says nothing about the recipients who will be eligible if the permanent injunction sought by plaintiffs is granted.

It is also important to note that the newly eligible population will include not only the cognitively impaired. For example, an individual susceptible to epileptic seizures, but otherwise physically able in all respects and having no cognitive impairment, will be able to claim eligibility for personal care services based on the need for safety monitoring alone. That such a person is currently excluded from personal care services demonstrates that the failure to assess safety monitoring as a separate task applies alike to the physically and mentally impaired, and does not discriminate against either.

As for individuals currently eligible for personal care services-- who may receive safety monitoring in conjunction with recognized tasks -- their entitlement to hours of care can be

expected to increase significantly if safety monitoring is separately assessed. The need for safety monitoring does not limit itself to certain hours of the day. The patient who currently receives eight hours a day of personal care services, consisting of currently assessed tasks with which safety monitoring is provided in conjunction, will now have a basis to seek additional personal care services, in the form of safety monitoring, for the remaining sixteen hours. Clients who would otherwise turn to family or friends for part-time assistance in assuring their safety will now, based on an independent entitlement to safety monitoring, have a basis to seek personal care services at all hours. As a result, the status of Medicaid as the "payer of last resort" will be undermined. *See Costello v. Geiser*, 85 NY2d 103, 106 (1995).

It is self-evident that such a situation will significantly increase the financial burden on the State's Medicaid program. Plaintiffs argue that, to the contrary, home care is less expensive than institutional care, and therefore money will be saved. But for much of the population affected by the permanent injunction, the choice will not be between the home or an institution. Providing safety monitoring as a separately assessed task will lay a basis for patients who would otherwise receive home-care from family, friends, or other sources to turn to Medicaid.

The burden that will be placed on the Medicaid system will be compounded by the fact that, unlike currently assessed tasks, safety is required at all times. If an individual is in danger of suffering harm, that danger does not abate at certain

hours of the day. The increased requirement to provide safety monitoring is likely to create conflicts with other tasks. Thus for example, a home care worker who is providing safety monitoring will be prevented from leaving a recipient alone while doing other tasks, such as shopping or doing laundry. *See* 18 NYCRR § 505.14(a)(6)(i)(a). It is therefore likely that certain patients will, at certain times, require the services of two home care workers at once, further increasing the already significant financial pressure on the system.

In short, the permanent injunction sought by plaintiffs would fundamentally alter the State's personal care services program in ways never countenanced by the United State Supreme Court in *Olmstead*. The likely changes in the program's essential nature and financial impact remove this case from the ambit of the ADA.

CONCLUSION

THE ORDER AND DECISION (ONE PAPER) APPEALED FROM SHOULD BE REVERSED AND THE PERMANENT INJUNCTION VACATED.

June 8, 1999

Respectfully submitted,

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