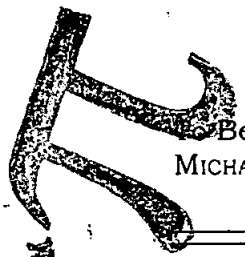

To Be Argued By:
MICHAEL T. HOPKINS

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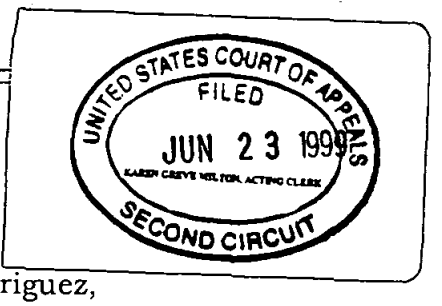

United States Court of Appeals
For the Second Circuit

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-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 COUNTY DEPARTMENT OF SOCIAL SERVICES, COMMISIONER, SUFFOLK COUNTY DEPARTMENT OF SOCIAL SERVICES, THE NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES,

Intervenor-Defendants-Appellants,

[caption continues inside]

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

BRIEF FOR INTERVENOR-DEFENDANT-APPELLANT COMMISSIONER NASSAU COUNTY DEPARTMENT OF SOCIAL SERVICES

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

Defendants-Appellants.

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PRELIMINARY STATEMENT

Intervenor-Defendant-Appellant Commissioner Irene Lapidez of the Nassau County Department of Social Services ("Nassau County") submits this brief in support of its appeal from the Opinion and Order dated April 19, 1999 and Judgment dated May 13, 1999 entered in the United States District Court for the Southern District of New York (Scheindlin, J.) ("appealed Order")that granted plaintiffs motion for a permanent injunction and required that safety monitoring be made a separate stand alone task.

It is submitted by Nassau County that the appealed Order of the Court has fundamentally altered the Personal Care Attendant Program (hereafter "PCA") in a manner not required by the Medicaid and/or disability laws cited by the Court in support of its appealed Order.

The County of Nassau joins in the Medicaid arguments advanced by the defendant State of New York and the arguments advanced by the defendant City of New York on the disability laws and irreparable harm. They will not be repeated at length herein. However, the defendant Nassau County will highlight several of those arguments.

STATEMENT OF JURISDICTION APPELLATE AND SUBJECT MATTER

This class action was commenced on February 3, 1997 by the filing of a Summons and Complaint challenging the Medicaid PCA Program established pursuant to Title 42 U.S.C. §§ 1396a et seq. and implemented in New York State pursuant to Social Service Law §§ 62(1), 363-a(1), et seq. In New York State those services or tasks

included within the ambit of the PCA program are to be found at 18 N.Y.C.R.R. §§ 505.14 (the "Regulation"). The Regulation identifies certain basic and limited tasks, otherwise known as activities of daily living (ADL) of hygiene, nutrition and housekeeping that the PCA program will deliver to eligible patients, at home, providing that their safety can be reasonably assured.

Specifically, by Order to Show Cause dated February 3, 1997 the plaintiffs challenged the implementation of the PCA program, by the local districts throughout the state, via their use of an assessing protocol known as Task Based Assessment (hereinafter "TBA") which separately allocates a time to each task permitted under the Regulation. A preliminary injunction was granted as to each of the then named plaintiffs prohibiting a reduction in benefits pending a full hearing on the preliminary injunction.

The hearing was then held and spanned many days. At the conclusion of the hearing, the District Court below issued an Amended Order and Opinion dated August 21, 1997. A timely appeal was taken therefrom.

On November 16, 1998 (as amended March 23, 1999) this Court vacated the District Court's preliminary injunction contained in the District Court's Amended Order and Opinion dated August 21, 1997. However, this Court did not decide on the merits, the requirement of safety monitoring as a stand alone task.

On remand the District Court on April 19, 1999 issued its appealed Order for essentially the same reasons cited in its August 21, 1997 Amended Order and Opinion and made additional reference to

the Americans With Disabilities Act (ADA) in support of its appealed Order.

Jurisdiction in the District Court below was based upon 28 U.S.C. § 1331, 42 U.S.C. §§ 1396 and 1983. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the District Court below err when it found that "safety monitoring" is a required, separate, distinct, stand alone task of the PCA program established under the Regulation?

STANDARD OF REVIEW

In a case such as this, on appeal there is a de novo review as to questions of law and a "clearly erroneous" review as to findings of fact. Purgess v. Shamrock, 22 F.3d 134 (2d Cir. 1994).

STATEMENT OF THE CASE

For a more detailed statement of the case the Court is respectfully referred to the brief submitted on behalf of the New York State defendants (the "State") and same will not be repeated herein. However, to the extent the injunction related to Nassau County participants in the PCA program, a brief statement of the case will ensue.

The Nassau County TBA program is known as the Task Oriented Plan of Care ("hereinafter "TOPC") protocol developed by Nassau County to assess requests to participate in the PCA program. It was patterned after earlier and similar programs used in Suffolk and Westchester. The TOPC protocol, along with all other related

documents have been in use by Nassau County since January 1995 (A1673-1679; 3661)

Since January, 1995 all PCA assessments and reassessments are done "in house" by Nassau County employed registered nurses with extensive geriatric experience. The assessing registered nurses initially trained with the County of Suffolk and receive written guidelines and oral instruction as well as field training. (A1673-1679;3670) The written guidelines and oral instruction given to the assessing registered nurses encourage an override in task based allotted time in the event identified task(s) span twenty-four (24) hours (A3661 at item 20; A1683-1685)

At no time has or does the County of Nassau allow safety monitoring as a stand alone separate task under the Regulation (A1695-1701, 1717-1720).

At no time during the hearing was there any testimony that the Nassau County assessing nurses feel themselves "handcuffed" by the TOPC form or incapable of an override where: (1) appropriate and (2) the patient is otherwise eligible for the PCA program. Furthermore, the expert testimony confirmed that it is within the judgment of the assessing nurse whether or not a patient, whose tasks span 24 hours, can have those needs adequately met by a sleep-in PCA aide. (A923-926, 931-938, 960-961,987-1000)

Juana Rodriguez

Ms. Rodriguez was originally a participant of the "Lombardi" long term health care program administered not by Nassau County, but by the City of Long Beach. (A470-473)

At the hearing, her son testified that at no time did a doctor ever order repositioning of his mother every two hours which order would be required before the task of repositioning could be used to justify two (2) 12 hour split shift PCA aides. Ms. Hernandez, the County of Nassau assessing registered nurse believed that Ms. Rodriguez' occasional nocturnal needs (diapering with concurrent repositioning) could be adequately met with a sleep-in PCA aide. There was no testimony that Ms. Rodriguez would be at risk, e.g., to develop bedsores, if the protocol developed by Ms. Hernandez was followed. (A1021-1026, 1035-1037)

Mary Weinblad

Ms. Weinblad's daughter testified to a continuing and marked mental deterioration of Ms. Weinblad for an extended period of time. (A677, 687-701) Upon initial PCA assessment in April, 1996 Ms. Weinblad signed her own Statement of Understanding and she "tasked out" to 3.7 hours. (A809-826; 3504-3522)

Upon reassessment some months thereafter, Ms. Weinblad had a marked deterioration in mental status and would otherwise be ineligible for the PCA Program but for family support and assistance. She was reauthorized for 40 hours of task time. The reauthorization of the assessing registered nurse, Ms. Harris, was never challenged by expert testimony. (A827-846)

Mary Russo

Like the other County of Nassau patients, Ms. Russo had Alzheimer's Disease and over time, developed wandering tendencies, became assaultive and resistive to care. Upon initial

authorization, Ms. Russo was receiving a sleep-in PCA aide but upon reassessment was found to be ineligible for PCA because of the inability of the program to safely maintain her at home. (A3523-3590, 848-860)

In each instance wherein the District Court found a threat of irreparable harm same was done without regard to care in a nursing home being an appropriate, harm avoiding alternative (Appealed Order at p. 56)

Moreover, up to the moment of this appeal there has not been a single identified instance of harm befalling any person, recipient or applicant of PCA Program because safety monitoring is not dealt with as a separate, stand alone task.

SUMMARY OF ARGUMENT

Plaintiffs have failed to show that any resident of Nassau County will be potentially harmed, much less harmed in reality, because Nassau County used a TOPC form to do task based assessing which does not include safety monitoring as a separate task. Up to the date of this brief not one Nassau County resident has been shown to have been injured.

The District Court erred when it held the Medicaid "comparability" and ADA requirements were violated in the context of this case. To require "safety monitoring" as a stand alone, off the shelf "task", unrelated to activities of daily living so fundamentally alters PCA as to exponentially expand the pool of potential recipients in a program not designed nor capable of meeting their needs.

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ARGUMENT

POINT I

THE ABSENCE OF SAFETY MONITORING AS A SEPARATE STAND ALONE TASK UNDER 18 N.Y.C.R.R. § 505.14 DOES NOT VIOLATE THE COMPARABILITY PRINCIPLE FOUND IN 42 U.S.C. § 1396a(a)(10)(B)

For a more detailed analysis of the legal arguments the Court is respectfully referred to the points raised in the briefs of the State and City.

It will be pointed out here, however, that the keystone which holds together the legal construct made by the District Court below is a violation of the comparability principle found in 42 U.S.C. § 1396a(a)(10)(B).

The District Court has, it is respectfully suggested, either misinterpreted and/or misapplied this circuit's interpretation of the comparability requirements of the Medicaid law as articulated in Camacho v. Perales, 786 F2d 32 (2d Cir. 1986). All Camacho stands for is the proposition that the amount, duration and scope of medicaid assistance to the categorically needy may not be less than that which is provided to be medically needy. It does not authorize the Court to make a medical comparison of the ailments that afflict mankind to make sure that identical medical assistance is provided. It is submitted this is not the "comparability required by Camacho.

Indeed, in this case there is simply no testimony which supports the erroneous legal conclusion arrived at by the District

Court.

The most that is required of "comparability" is that equivalent benefits must be available amongst other groups of Medicaid recipients. Until the appealed Order from the District Court below, no case has been located which allows the Court to append services to a Medicaid program designed to benefit a particular group. Blanchard v. Forrest, 71 F.3d 1163 (5th Cir. 1996), cert. denied, 116 S.Ct. 2540 (1996) Cf Sobky v. Smoley, 855 F.Supp.1123 (E.D.(1994); Harris v. James, 127 F.3d 993 (11th Cir. 1997).

For the District Court to order safety monitoring as a separate "task" produces another dilemma: what does the term mean? What are its parameters? What are the skills that the PCA aides must possess in order to deal with "safety monitoring"? Will those skills vary depending upon the underlying nature of the problem that triggers the need for safety monitoring? Are the needs of the "clinically depressed" the same as an autistic adult? How is safety monitoring to be delivered? Must there be two (2) PCA aides in the home at all times to ensure that at least one (1) aide is constantly with the recipient?

Nassau County has no experience in the area of "safety monitoring" as a discrete stand alone task and should not be required to speculate as to its responsibilities under the appealed Order (A.1695-1701, 1818-1720, 3753-93).

For the balance of the arguments in favor of reversal, the Court is respectfully referred to briefs of the State and City.

POINT II

THE ADA HAS NOT BEEN VIOLATED

For a more detailed analysis of the legal arguments on the ADA issue, the Court is respectfully referred to the arguments raised in the brief of the City. This point will merely highlight the fundamental alteration to the PCA program that is required by the appealed Order.

It is the position of the District Court below that the defendants have all provided, historically, safety monitoring as a stand alone task. This is simply not the case.

But even if it were accurate to claim that there was the occasional and random provision of "safety monitoring" to persons who were cognitively impaired, or who had attention deficient, the appealed Order is not limited to the elderly Alzheimer patient. Indeed, there was no evidence whatsoever in this case, except as to the elderly Alzheimer patient.

Yet, the appealed Order is not self limiting to that exclusive category of patient. The defendants are given no guidance whatsoever (assuming it was legal) in how to limit the scope of the appealed Order. And that is precisely because the appealed Order, in creating a stand alone, off the shelf, undefined and undescribed amorphous task known as "safety monitoring" has opened the PCA program to non-homebound patients who can perform all activities of daily living (hygiene, housekeeping, etc.) but who need "safety monitoring" so that no harm comes to them or others. To attempt to

provide this service to these additional categories of patients places burden on the defendants which cannot be discharged. If this was not the desire of the District Court below, it should have so stated in its appealed Order.

If this is the desire of the District Court, then it should have demanded of the plaintiffs some evidence why other available programs are inadequate, and proof that the financial impact is only minimal. Even as to the elderly Alzheimer patient the District Court was wrong to limit the financial impact to a comparison between PCA and residential health care facility (nursing home) costs (hereafter "RHCF"). For example, the District Court did no cost analysis to alternative programs even for the elderly Alzheimer patient.

Moreover, the District Court assumed that PCA would not exceed 90% of RHCF costs. Yet this assumption ignored the exception criterion [established by the State in its administrative directive 92 ADM-49(A3680)]for denial of personal care services when it is shown RHCF placement would diminish the patient's ADLs. Therefore, to the extent the District Court made a comparison of costs between PCA and RHCF it failed to factor in that virtually every individual plaintiff in this case would undoubtedly claim an exception to RHCF placement. In such cases, the cost will exceed RHCF placement. (It should be noted that even this exception is the subject of a court challenge. Best v. New York State, et al, Index No.404648/98 pending in Supreme Court, New York County before Hon. Moskowitz. If successful the 90% rule relied upon by the District Court below

will fall entirely.)

As was pointed out in the affidavit of Eileen Halpin submitted on behalf of the County of Nassau application for a stay pending appeal and expedited appeal, the potential pool of applicants for PCA services, in the absence of a definition for safety monitoring, will undoubtedly increase. However, as to existing cases, the County of Nassau share is reasonably expected to be about $7,000,000.00. This cost is not a mere "drop in the bucket" and to the extent the County of Nassau is required to assume this cost it necessarily takes away available money from other programs. (Halpin affidavit sworn to June 1, 1999 at ¶¶ 17-22)

CONCLUSION

For the reasons stated above, and as contained in the briefs of the State and City defendants, the Opinion and Order dated April 19, 1999 should be reversed.

Dated: Garden City, New York
June 21, 1999

Respectfully submitted,

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By: _____

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