

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

DONNA RADASZEWSKI,)	
Guardian, on behalf of Eric Radaszewski,)	
)	
Plaintiff,)	
)	
vs.)	No. 01 C 9551
)	
BARRY MARAM,)	Judge John W. Darrah
)	
Director, Illinois Department of)	
Healthcare and Family Services,)	
)	
Defendant.)	

**Plaintiff’s Motion in Limine to Limit Testimony of
Barbara Ginder**

Plaintiff Donna Radaszewski, by counsel Prairie State Legal Services, Inc., moves to limit the testimony of defendant’s witness Barbara Ginder, to exclude testimony constituting legal opinions. In support of this Motion, plaintiff states:

1. Defendant has disclosed that he expects to call Barbara Ginder as an opinion witness.
2. Ms. Ginder is Bureau Chief of the Bureau of Interagency Coordination for the Illinois Department of Healthcare and Family Services (HFS). Ms. Ginder has a professional background as a registered nurse. She is not a lawyer. (Exhibit A, pages 1-9 of Ginder deposition in *Sidell v. Maram*).
3. In Defendant’s Amended Disclosure of Expert and Opinion Testimony, defendant stated that Ms. Ginder’s testimony will relate to reasonable accommodation of the Plaintiff and that her opinions “were disclosed in Defendant’s Amended Responses to Plaintiff’s First Set of

Interrogatories, Numbers 1,2,3,4,5A.1.a - 5A.1.d, 5A.2.i - 5A.2.v, 5A.2.b.i, 5B and 5C and Defendant's Third Amended Responses to Plaintiff's First Set of Interrogatories, Nos. 5.A(1) - (2)(b)(ii)(A)(1-6)." (Exhibit B, Defendant's Amended Disclosure of Expert and Opinion Testimony). Defendant's Third Amended Response to Plaintiff's First Set of Interrogatories, No. 5.A(1) - (2)(b)(ii)(A)(1-6) was subsequently stricken by the court's Order of May 10, 2007, as clarified by the Parties' Agreed Order of June 7, 2007.

4. Several assertions stated in Defendant's Amended Responses to Plaintiff's First Set of Interrogatories with respect Interrogatories 5 and 2 include multiple legal conclusions going to defendant's defenses. These assertions read like a legal brief, with statutory and case citation, rather than opinion testimony concerning facts. (Exhibit C, Defendant's First Amended Response to Plaintiff's First Set of Interrogatories, Responses 2 and 5).

5. Testimony as to legal conclusions going to the outcome of the case is inadmissible. *Good Shepherd Manor Foundation Inc., v. City of Momence*, 323 F.3d 557, 564 (7th Circ. 2003). "As a result, courts will not admit testimony on purely legal matters and comprised solely of legal conclusions." *In re Ocean Bank*, 481 F.Supp.2d 892, 898 (N.D. Ill. 2007).

6. The opinions attributed to Ms Ginder in the Interrogatories referenced above that constitute legal conclusions on purely legal matters include defendant's responses to plaintiff's Interrogatories Nos. 5 and 2, are quoted below:

Interrogatory No. 5:

Is it your contention that the relief plaintiff seeks on behalf of her son cannot be reasonably accommodated?

If so, please provide the following:

A. Please describe in detail each and every basis for your denial and each and every fact upon which you rely in making this denial.

B. For each such basis and/or fact listed in response to Interrogatory No. 5(A),

please state the name, telephone number and address of each person having information concerning such basis and/or fact.

C. For each such basis and/or fact listed in response to Interrogatory No. 5(A), please identify each document that relates to such basis and/ or fact.

Defendant's Amended Response to Interrogatory No. 5:

5A. Defendant incorporates his objections as stated in his original amended response to this Interrogatory and further states:

5.A.1. Plaintiff, in her complaint, has not stated the relief sought with any specificity. The prayer for relief merely requests an injunction "enjoining Defendant from failing to afford Eric continued nursing services at home rather than in an institution." To the extent that Eric Radaszewski participated in the HSP and in fact received skilled nursing services in his home under the HSP with an exceptional care rate, he was reasonably accommodated in the following particulars:

5.A.1.a. Eric Radaszewski was not excluded from participation in the Home Services Program by reason of his disability or by any act or omission of Defendant....

5.A.1.b. Defendant reasonably accommodated Eric Radaszewski in the Home Services Program by extending an exceptional care rate to him. The Adult Disabled Waiver that governs the operation of the Home Services Program expressly provides that the Defendant will not expend any more money on services to individuals in the waiver than would be incurred if these persons were residing in nursing facilities. ...

5.1.c. State law at 89 Ill.Admin.Code §682.520(c), authorizes the Illinois Department of Human Services to extend a rate up to the exceptional care rate set by the Defendant for the nursing facilities participating in the Exceptional Care Program, to a participant in the Home Services Program whose medical condition corresponds to one of the conditions for which HFS would pay an exceptional care rate if that person were in the nursing home. ...

5.2. If the reasonable accommodation that Plaintiff seeks is 24 hours per day in-home one-on-one private duty registered nursing services, as the complaint suggests, then that relief would not constitute a reasonable accommodation because under the law as set forth in *Alexander v. Choate*, 469 U.S. 287 (1985) and *Wisconsin Community Services, Inc. V. City of Milwaukee*, 465 F.3d 737 (7th Cir. 2006), the reasonable accommodation of 24 hours per day in-home one-on-one private duty registered nursing services is not necessary, reasonable or

grounded in any independent basis in Title II of the ADA.”

5.2.a. The reasonable accommodation Eric Radaszewski seeks is not necessary. Neither the Rehabilitation Act nor the Americans with Disabilities Act require Defendant to modify any of its programs for Eric Radaszewski because the benefits he seeks, i.e., 24 hours per day in-home private duty registered nursing services, were not denied to him by reason of his disabilities. Eric Radaszewski does not qualify for 24 hours per day of in-home private duty nursing because of qualities that Eric Radaszewski shares with all other Medicaid recipients and applicants. Rather, all the factors set forth below are qualities that Eric Radaszewski shares with all Medicaid recipients and applicants, as follows:

...

5.2.a.ii. Private duty nursing services are an optional service under federal Medicaid law. 42 U.S.C. §§1396a(a)(10)(A), 1396d(a)(8). Private duty nursing services are not covered under Illinois’ Title XIX State Medicaid Plan. No Medicaid-eligible person qualifies to receive such services at any situs. Whether the State of Illinois covers an “optional” Medicaid services is a policy judgment committed to the discretion of State officials and for which there is no right of judicial review. *Daimler-Chrysler, Id.* at 1863 (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (opinion of Kennedy, J.). ...

5.2.a.iii. No participant in the Home Services Program qualifies to receive private duty nursing services because they are not a part of the Adult Disabled Waiver of Illinois’ Title XIX State Medicaid Plan.

5.2.a.iv. Eric Radaszewski, an individual over the age of 21, is no longer eligible for EPSDT, 42 U.S.C. §§ 1396a(a)(43); 1396d(r) and, consequently, may not now receive services that are not covered under the State’s Medicaid Plan.

5.2.a.vi. To the extent HFS’s clinical professionals were reviewing plans of care for Eric before he turned 21 and participated in the MFTD Waiver, they were not reviewing medical need for “waiver” services and they were not the State’s “treatment professionals” making any determination whether Eric could live in the community with proper supports. *Cf. Olmstead v. L.C.*, 527 U.S. 581, 602-603, 119 S.Ct. 2176, 2188 (1999). Rather, HFS clinical experts were entitled to make an independent determination for the purposes of the EPSDT program that services prescribed for Eric that were not covered under Illinois’ Title XIX Medicaid plan were medically necessary. *Miller by Miller v. Whitburn*, 10 F.3d 1315 (7th Cir. 1993)

5.2.b. The accommodation Eric Radaszewski seeks is not reasonable. The court need not reach this issue because it must conclude that the

accommodation/modification Eric Radaszewski seeks is not necessary.

5.2.b.i. If the court were to reach the issue of reasonableness, it would conclude that the accommodation/modification sought is not reasonable. First, the modification Plaintiffs seeks to the Home Services Program is not necessary to avoid discrimination to Eric Radaszewski on the basis of disability. 42 U.S.C. § 12131(2); 28 C.F.R. § 35.130(b)(7). Defendant adopts all the facts and arguments set forth in his Amended Answer No. 5(A)(2)(a) as his answer here.

5.2.b.ii. Second, Defendant also contends that the accommodation/modification Eric Radaszewski seeks would fundamentally alter the nature of the Home Services Program. If Defendant were to provide a benefit in excess of existing home and community waiver benefit levels, Defendant would be required to extend the same benefit to all other persons. The benefits would have to be extended to all participants in the Home Services Program (and, presumably, all other programs operated under the umbrella of the Home and Community-Based Services Waiver), and to certain current residents of nursing facilities. [These are legal conclusions as to what the law would require if reduction in Eric's Radaszewski's nursing services were to be enjoined].

Plaintiff's Interrogatory No. 2:

In your Answer to Count VI, Paragraph No. 41 of Plaintiff's Supplemental Complaint for Injunctive Relief, you deny that "in-home nursing is the most integrated setting for services for Eric and is at least as cost-effective as treatment he would receive in an institution."

A. Please describe in detail each and every basis for your denial and each and every fact upon which you rely in making this denial.

...

Defendant's Amended Response to Interrogatory No. 2:

....

A. ... Finally, Eric Radaszewski has no present "right" to receive or "legally protected interest" in receiving any Medicaid-funded services in the community (i.e., in his parents' home), unless he qualifies for a home and community-based services waiver administered by Defendant pursuant to 42 U.S.C. § 1396n(c). Medicaid-funded waiver programs are an opportunity or capability for receiving some services in the community to prevent admission to a long-term care facility. Section 1396n(c).

....

If Eric Radaszewski does not qualify for the Home Services Program, there is no other program or option administered by Defendant and funded by Medicaid

through which he can receive in-home nursing services. If Plaintiff is claiming that Defendant must create new programs to care for her son, that claim is not cognizable in the federal court. *DaimlerChrysler Corp. v. Cuno*, ___ U.S. ___, 126 S.Ct. 1854 (2006), *Olmstead v. L.C.* 527 U.S. 581 (1999)(Kennedy, J. concurring). The *Olmstead* Court state that the “states must adhere to the ADA’s nondiscrimination requirement with regard to the services they in fact provide.”

7. Plaintiff asks the court to limit Ms. Ginder’s testimony to exclude the above-described legal conclusions.

Respectfully submitted,

s/Sarah Megan
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Certificate of Service

I hereby certify that on August 23, 2007, I presented the foregoing Plaintiff's Motion In Limine to Limit Testimony of Barbara Ginder with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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Respectfully submitted,

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