NO. COA10-80 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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MICHAEL JONATHAN MCCRANN, JR. BY GUARDIANS KELLY C. MCCRANN AND MICHAEL J. MCCRANN,	)	
PETITIONER,	)	
v.	)	From WAKE COUNTY 08-CVS-9471
NC DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF MENTAL HEALTH, DEVELOPMENTAL DISABILITIES AND SUBSTANCE ABUSE SERVICES,	)	
RESPONDENT.	)	

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AMICUS CURIAE BRIEF OF
DISABILITY RIGHTS NORTH CAROLINA

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AMICUS CURIAE BRIEF
(DISABILITY RIGHTS NORTH CAROLINA)

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Disability Rights North Carolina ("DRNC") respectfully submits this brief as *amicus curiae* in support of Petitioner-Appellee Michael Jonathan McCrann, Jr. by Guardians Kelly C. McCrann and Michael J. McCrann ("Jonathan"). *Amicus* believes that Petitioner-Appellee should prevail on this appeal for the reasons stated in Petitioner's brief. *Amicus* submits this brief to challenge Respondent-Appellant's stated reasoning for failing to authorize medically necessary, cost-neutral care for Jonathan - a rationale that evidences a disregard for the Department's

obligations under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.* (2006).[1] *Amicus* also urges this Court to reject the Department's argument that the CAP-MR/DD Waiver and Manual are "medical coverage policies." *See* N.C. Gen. Stat. §§ 108A-54.2 & .3, 150B-1(d)(9) (2009). *Amicus* respectfully requests that this Court affirm the judgment of the court below.

ARGUMENT

I. THE DEPARTMENT LACKS LEGAL JUSTIFICATION FOR FAILING TO REASONABLY MODIFY THE CAP-MR/DD WAIVER AND PROVIDE MEDICALLY NECESSARY, COST-NEUTRAL CARE FOR JONATHAN.

The Department of Health and Human Services, Division of Mental Health, Developmental Disabilities and Substance Abuse Services ("the Department") admits that it would continue to approve Jonathan for Home and Community Support services but for its newly implemented policy that persons residing in licensed residential settings may not receive the service. (R. at 23-24, 70-72.) For the reasons argued by Petitioner-Appellee, this limitation is unlawful. Moreover, *amicus* posits that failure to reasonably modify this limitation in the Community Alternatives Program for Persons with Mental Retardation/ Developmental Disabilities ("CAP-MR/DD Waiver") discriminates against Jonathan

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[1] Though not explicitly couched in terms of a reasonable accommodation or modification under the ADA, the ALJ's decision exhorts the Department to look past its "narrow and non-mandatory reading of one of its service definitions," and provide Jonathan with medically necessary services. (R. at 30.)

based on his disability in violation of the Americans with Disabilities Act. *See* 42 U.S.C. § 12101, *et seq.* Requiring the Department to authorize Home and Community Support ("HCS") services for Jonathan as a reasonable modification would not fundamentally alter the CAP-MR/DD Waiver program, and merely reauthorizes Jonathan to receive medically necessary, cost-neutral care he has long received. *See* 28 C.F.R. § 35.130(b)(7)(2009).

A. Jonathan Is Eligible To Receive And Fully Qualifies For CAP-MR/DD Medicaid Waiver Services.

Medicaid is a program jointly funded by the federal government and the States, which provide medical assistance to eligible persons with disabilities. *See* 42 U.S.C. § 1396 (2006). As part of its Medicaid program, a State may opt to provide some citizens with additional home and community-based services as an alternative to institutional care; these services are provided through a Home and Community Based Services waiver ("HCBS waiver"). *See* 42 U.S.C. § 1396n(c)(1) (2006). It is called a "waiver" because general requirements - such as the requirement that Medicaid-funded services be available statewide - are waived. 42 U.S.C. § 1396n(c)(3) (2006).[2] Habilitative

[2] States apply for HCBS waivers from the Centers for Medicare and Medicaid Services (CMS). *See* 42 U.S.C. § 1396n(c)(1) (2006); 42 C.F.R. § 430.25 (2009). *See also* 42 U.S.C. § 1396n(c)(2) (2006) (assurances that must be contained in Waiver applications); 42

services that may be provided under an HCBS waiver are those "designed to assist individuals in acquiring, retaining, and improving the self-help, socialization, and adaptive skills necessary to reside successfully in home and community based settings." 42 U.S.C. § 1396n(c)(4)(B) & (5)(A) (2006). Operating within federal guidelines, States enjoy substantial autonomy and flexibility in designing and implementing the habilitative services available to waiver participants. *See* 42 C.F.R. § 430.25(b) (2009).

In North Carolina, persons with mental retardation and other developmental disabilities requiring an institutional level of care may receive home and community-based habilitative services through the CAP-MR/DD Waiver program. *See* 42 U.S.C. § 1396n(c)(1) (2006). (R. at 21, 66.) Jonathan is eligible for and participates in the CAP-MR/DD Waiver because he is a person with the disabilities of cerebral palsy, mental retardation, and autism who would otherwise require an institutional level of care. *See* 42 U.S.C. § 1396n(c)(1) (2006); 42 C.F.R. § 441.301 & .302 (2009) (participation in a waiver program necessarily indicates that absent waiver services, individual would require

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C.F.R. § 441.302 (2009) (requiring additional but materially similar assurances). The substance and assurances required as part of the waiver application fulfill the requirements for receiving waiver approval from CMS. *Compare* 42 C.F.R. § 441.302 (2010) *with* 42 C.F.R. § 441.301 (2010).

an institutional level of care). (R at 21, 66). Jonathan has additional severe disabilities, including left hemiplegia (weakness or paralysis), a substantial visual impairment, and aqueductal stenosis and hydrocephalism which required insertion of a permanent shunt. (R. at 21, 66.)

Each year, Jonathan and his treatment team draft a written plan of care identifying the CAP-MR/DD Waiver services that are medically necessary for him to continue successfully residing in the community. *See* 42 C.F.R. § 441.301(b)(1)(i) (2009). (R. at 22, 67-68.) By 2005, due in large part to habilitative services provided by Ms. Edna McNeill, Jonathan had successfully resided in the community in his group home for more than three years.[3] (R. at 70.) Accordingly, Jonathan's Plan of Care for 2006 requested maintenance of Ms. McNeill's services. (R. at 22-23, 68, 70-71). In the 2005 CAP-MR/DD Waiver ("2005 Waiver"), these services had been newly renamed as Home and Community Support (HCS) services, which the Department claims are no longer available to individuals like Jonathan living "in licensed residential settings or unlicensed alternative family living arrangements." (R. at 23-24, 71.) Services that Jonathan had utilized since his enrollment in the Waiver had disappeared with

[3] Jonathan has worked with Ms. McNeill since the CAP-MR/DD Waiver program was established in 2001, and also worked with her prior to the establishment of the Waiver program. At the time this action was commenced, the two of them had worked together for over a decade. (R. at 20, 22, 65, 68.)

the stroke of a pen. Yet, nothing about his disabilities, eligibility for the CAP-MR/DD Waiver, or cost of care had changed. (R. at 23, 65-66, 71.)

B. Even Accepting The Department's Limitation As Lawful, The CAP-MR/DD Waiver Must Be Reasonably Modified To Provide Jonathan With Medically Necessary, Cost Neutral Services As Is His Right Under The Americans With Disabilities Act.

Should this Court accept the Department's policy that HCS services are not available to Jonathan based on his residence, a reasonable modification of the CAP-MR/DD Waiver would provide Jonathan with medically necessary services. Title II of the Americans with Disabilities Act ("ADA") provides that "no qualified individual with a disability shall, by reason of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subject to discrimination by such entity." 42 U.S.C. § 12132 (2006).[4] A "qualified individual" is one who meets essential eligibility requirements for a program or services with or without reasonable modifications to the rules, policies, and practices of the program. 42 U.S.C. § 12131(2) (2006). "Public entities" covered by the ADA include State

[4] It bears noting that Jonathan's rights under Section 504 of the Rehabilitation Act are substantially identical to those under the ADA. *See Disability Advocates, Inc. v. Paterson II*, 653 F. Supp. 2d 184, 2009 U.S. Dist. LEXIS 80975 (E.D.N.Y. 2009).

government, local government, and their instrumentalities. 42 U.S.C. § 12131(1) (2006). Public entities must make reasonable modifications to policies, practices, or procedures when necessary to prevent discrimination against an individual with a disability. 28 C.F.R. § 35.130(b)(7)(2009). Discrimination includes the provision of different services within classes of individuals with disabilities. 28 C.F.R. § 35.130(b)(1)(iv) (2009); *see also Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 598, 119 S.Ct. 2176, 2186, fn. 10 (1999) (uneven treatment of members of same protected class is discriminatory.)

The Department is a public entity under Title II of the ADA and its implementing regulations. The Department stipulates that Jonathan is a qualified individual with a disability. (R. at 20, 65.) The Department further stipulates that the requested service is medically necessary for Jonathan and that cost was not a factor in denying the service. (R. at 20, 65.) Thus, the Department agrees that the services in Jonathan's 2006 Plan of Care provide him with care that he would otherwise be required to seek from an institution, but at a lower cost and in a home and community-based setting. The Department's failure to reasonably modify a service limitation and authorize medically necessary care for Jonathan is discriminatory.

1. The Department May Not Deny Services to Jonathan Based on Non-Disability Related Criteria.

The Department's position that Home and Community Support services may be authorized for persons residing in non-licensed residential settings, while denying the same service to persons residing in licensed residential settings is discriminatory under the ADA. *See* 28 C.F.R. § 35.130(b)(1)(iv) (2009). States may not design and implement an HCBS waiver that, with respect to persons with similar disabilities, provides them with different levels of care based on non-disability related criteria. *See Olmstead,* 527 U.S. at 598, 119 S.Ct. at 2186, fn. 10; *see also Townsend v. Quasim,* 328 F.3d 511, 2003 U.S. App. LEXIS 8282 (9th Cir. 2003) (finding that Washington State could not opt to provide services to categorically needy disabled persons and not to medically needy persons who were otherwise similarly situated.) Additionally, merely enrolling eligible persons in an HCBS waiver does not immunize the State from charges of disability-based discrimination if the care provided is insufficient and endangers the waiver recipient's health. *See Grooms v. Maram,* 563 F.Supp.2d 840, 855, 2008 U.S. Dist. LEXIS 42883, 40 (N.D.Ill. 2008).

The Department admits that different levels of care are available to Jonathan under the HCS service definition. (R. at 70, 71.) Specifically, the Department concedes that it would

authorize Jonathan for medically necessary HCS services if they were provided in a setting other than his group home. (R. at 70.) It is discriminatory for the Department to deny Jonathan care that is provided to other Waiver recipients solely because he resides in a group home.

The Department additionally discriminates against Jonathan when it attempts to abdicate its obligation to maintain Jonathan's safety and welfare during his enrollment in the CAP-MR/DD Waiver program. *See* 42 U.S.C. § 1396n(c)(2) (2006); 42 C.F.R. § 441.302 (2009). The Department has stipulated that the requested service is medically necessary for Jonathan. (R. at 20, 65.) The service is medically necessary because, among other things, it provides Jonathan with needed one-on-one supervision and/or monitoring to avoid an accidental and possibly life-threatening blow to the head. (R. at 5.) Thus, the Department's failure to authorize medically necessary services for Jonathan unnecessarily endangers his health and welfare for reasons wholly unrelated to his disability, and in violation of his rights under the ADA.

2. The Department Has Failed To Reasonably Modify The CAP-MR/DD Waiver.

The Department's argument for a rigid, inflexible adherence to the restrictions in the CAP-MR/DD Waiver program is unreasonable and violates the ADA. *See* 28 C.F.R. §

35.130(b)(7)(2009) (requiring reasonable modifications); *see also Radaszewski v. Maram*, 2008 U.S.Dist.Lexis 24923 (N.D.Ill. 2008), *aff'g Radaszewski v. Maram*, 383 F.3d 599, 2004 U.S. App. LEXIS 18940 (7th Cir. 2004). The ADA explicitly requires public entities to make reasonable modifications to policies, practices, or procedures when necessary to avoid discrimination based on disability in the public entity's programs. *See* 28 C.F.R. § 35.130(b)(7)(2009). Reasonable modifications to HCBS waivers include modifying services provided by the waiver. *See Radaszewski* 2008 U.S.Dist.Lexis 24923 (N.D.Ill. 2008) (State elected not to provide in-home private duty nursing care under adult HCBS waiver comparable to that provided by children's HCBS waiver; State required to accommodate young man recently transitioned from children's waiver to adult waiver).

As demonstrated in the prior section, the Department's failure to authorize medically necessary services for Jonathan solely because he resides in a group home is discriminatory. However, the Department seemingly does not appreciate its obligation to remedy that discrimination by reasonably modifying the HCS services; rather it boasts that it "consistently applied the provisions of the CAP-MR/DD Waiver relating to the use of the in-home component of Home and Community Support Services." (Resp't-Appellant Br. at 15.) Remarkably, the Department's insistence that it may not provide the requested services in a

licensed residential setting is not based on federal or State requirements, but on a self-imposed limitation that appeared for the first time in the 2005 Waiver. *See* 42 U.S.C. § 1396n(c)(4)(B) & (5)(A) (2006) (defining habilitative services); 42 C.F.R. § 430.25(b) (2009) (recognizing that HCBS waivers provide States with flexibility in providing health care services). (Resp't-Appellant Br. at 13-16.) Accordingly, the Department's insistence that the provisions of the HCS service are inviolable must be corrected.[5] The Department should be directed to reasonably modify the limitation it placed on the HCS services, and reauthorize Jonathan to receive the requested medically necessary, cost-neutral care.

C. The Requested Modification Is Not A Fundamental Alteration Of The CAP-MR/DD Waiver Program.

The Department must be required to accommodate Jonathan's need for Home and Community Support services as the requested accommodation does not fundamentally alter the CAP-MR/DD waiver program. The fundamental alteration defense requires the State to show that relief for the plaintiff(s) would work an inequity as to all other citizens with disabilities in the State. *See* 28 C.F.R. § 35.130(b)(7)(2009); *Olmstead*, 527 U.S. at 604, 119 S.Ct. at 2189 (Ginsburg, J., plurality opinion.). Waiving a

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[5] It should be noted that on numerous other occasions, the Department has initiated amendments to the Waiver. None of its requested amendments has ever been denied by CMS. (R. at 69.)

particular restriction of a State's HCBS waivers is not inherently unreasonable or a fundamental alteration of the program. *Grooms*, 563 F.Supp.2d at 857. If this Court should direct the Department to reasonably modify its waiver program to satisfy the ADA, this does not change the other aspects of the waiver program such as the burden of demonstrating the medical necessity of services and the conduct of the usual utilization reviews. *See Radaszewski*, 2008 U.S.Dist.Lexis 24923 (N.D.Ill. 2008). As such, the modification of an HCBS waiver does not throw open the gates to all persons participating in the waiver to receive all services.

The Department stipulates that cost was not a factor in denying the Home and Community Support service to Jonathan. (R. at 20, 65.) Additionally, the Department acknowledges that Jonathan previously received the requested service at his group home for at least three years prior to the 2005 Waiver. (R. at 70.) Moreover, even if the Department provides HCS services to Jonathan or others similarly situated, it would not require the development, creation, or provision of services not currently provided. Thus, it is not inequitable for the Department to continue providing Jonathan with medically necessary, cost neutral services in his group home.

II. THE CAP-MR/DD WAIVER IS A FEDERALLY-AUTHORIZED HABILITATIVE SERVICE PROGRAM SUBJECT TO ADMINISTRATIVE RULEMAKING REQUIREMENTS, NOT A "MEDICAL COVERAGE POLICY."

The Department erroneously asserts that the entire CAP-MR/DD Waiver program is a medical coverage policy exempt from administrative rulemaking requirements. North Carolina has authorized the establishment of a State Medicaid plan for medical assistance pursuant to Title XIX of the Social Security Act. *See* 42 U.S.C. § 1396a (2006); N.C. Gen. Stat. § 108A-54 (2009). The General Assembly has delegated to the Department of Health and Human Services the authority to implement the Medicaid program through the administrative rulemaking process. N.C. Gen. Stat. § 108A-54 (2009). Exempted from this standard rulemaking process are "medical coverage policies," which are developed through an alternate process requiring consultation with the Physician Advisory Group, publication for public comment for 45 days, and if the policy is amended following comment, re-publication for an additional 15 days of public comment prior to actual adoption.[6] *See* N.C. Gen. Stat. §§ 108A-54, 150B-1(d)(9) (2009). There is no definition of "medical coverage policy" in the General Statutes.

Devoting only two sentences to the argument, the Department attempts to persuade this Court that the entire CAP-MR/DD Waiver

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[6] The 45 day period of public comment was shortened to 30 days by Appropriations Act of 2009, S.L. 2009-451 § 10.68A(c) (2009).

and corresponding programmatic manual ("Manual") may be appropriately shoehorned through the abbreviated "medical coverage policy" process. (Resp't-Appellant Br. at 12.) However, "medical coverage policies" are discrete, medically driven statements of policy describing clinical requirements for providers to charge services or procedures to Medicaid. *See e.g.*, Clinical Coverage Policy No. 1B-1, Botulinum Toxin Treatment: Type A (Botox) and Type B (Myobloc) (2008), available at http://www.ncdhhs.gov/dma/mp/index.htm (a 15 page document delineating specific conditions, such as infantile cerebral palsy, for which Botox is available as a treatment; includes claim type code, diagnostic codes, procedure codes, billing units, etc.). The Legislature did not intend that a comprehensive program such as the CAP-MR/DD Waiver and Manual, documents spanning 203 and 117 pages respectively, could be promulgated via a process as abbreviated as that found in Chapter 108A. The Department unfairly seeks to evade its rulemaking obligations by exploiting the statutory ambiguity surrounding the term "medical coverage policy" to the disadvantage of disabled persons like Jonathan.

Even if this Court should determine that the CAP-MR/DD Waiver is a "medical coverage policy," there is no evidence in the record that the 2005 CAP-MR/DD Waiver was in fact subjected to the "medical coverage policy" promulgation process required

by N.C. Gen. Stat. § 108A-54.2 & -54.3 (2009). Importantly, the 2005 CAP-MR/DD Waiver and Manual are not listed among the policies published on the Division of Medical Assistance's ("DMA") website. *See* http://www.ncdhhs.gov/dma/mp/index.htm. The Department's position that the CAP-MR/DD Waiver and Manual are medical coverage policies should be accordingly rejected.

CONCLUSION

For all the foregoing reasons, the Court should uphold the decision of the Wake County Superior Court in the case at bar and affirm the Judgment in favor of Petitioner.

Respectfully submitted this the 18th day of May, 2010.

DISABILITY RIGHTS NORTH CAROLINA

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing AMICUS CURI BRIEF upon the PETITIONERS-APPELLEES and RESPONDENT-APPELLANTS by placing a copy of same in the United States Mail, first class postage prepaid, addressed to their Attorneys of Record as follows:

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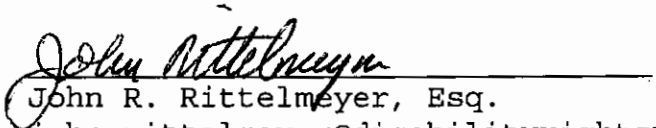
This the 18th day of May, 2010.

DISABILITY RIGHTS NORTH CAROLINA

By: 

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