

IN THE SUPREME COURT OF MISSOURI

No. SC89416

ANDREA BECHTEL, by her next friend BARBARA BECHTEL,

Petitioner - Appellant,

v.

DEPARTMENT OF SOCIAL SERVICES, STATE OF MISSOURI,

Respondent.

**On Appeal from the Circuit Court of St. Louis County
Honorable Robert S. Cohen**

BRIEF OF APPELLANT

**AMERICAN CIVIL LIBERTIES UNION OF
EASTERN MISSOURI**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	3
JURISDICTIONAL STATEMENT	5
STATEMENT OF FACTS	6
POINTS RELIED ON	10
ARGUMENT	13
CONCLUSION	35

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

Cases

§ 208.900.1 RSMo (Supp. 2005).....	passim
§§ 178.661-667 RSMo (2000).....	18
42 U.S.C.A. § 12132.	17
<i>Alexander v. Choate</i> , 469 U.S. 287, 300 (1985).....	18, 28
<i>Allison v. Department of Corrections</i> , 94 F.3d 494, 497 (8th Cir. 1996).....	16
<i>Barnes v. Gorman</i> , 536 U.S. 181, 184-85 (2002).....	16
<i>Bragdon v. Abbott</i> , 524 U.S. 624, 631-32 (1998).....	16
<i>Easley v. Snider</i> , 36 F.3d 297 (3rd Cir. 1994).....	19
<i>Easley</i> , 36 F.3d at 305.....	19
<i>Fisher v. Oklahoma Health Care Authority</i> , 335 F.3d 1175, 1183 (10 th Cir. 2003).....	22
<i>Frederick L. v. Dept. of Public Welfare</i> , 364 F.3d 487, 492 (3 rd Cir. 2004).....	20
<i>In re Estate of Shuh</i> , 248 S.W.3d 82, 84 (Mo.App. E.D. 2008).....	15, 31
<i>Juvelis v. Snider</i> , 68 F.3d 648, 653 (3rd Cir. 1995).....	17, 20
<i>Langford v. Sherman</i> , 451 F.3d 496, 504 (8th Cir. 2006).....	13, 31
<i>Layton v. Elder</i> , 143 F.3d 469, 472 (8th Cir. 1998).....	16
<i>Olmstead v. L.C. ex rel. Zimring</i> , 527 U.S. 581, 601 (1999).....	19, 20, 29
<i>PGA Tour, Inc. v. Martin</i> , 532 U.S. 661, 690 (2001).....	22
<i>Radaszewski v. Maram</i> , 383 F.3d 599, 611 (2004).....	12, 28, 29
<i>School Bd. v. Arline</i> , 480 U.S. 273, 287 (1987).....	21, 23
<i>State ex rel. Sunshine Enterprises of Missouri, Inc. v. Board of Adjustment of City</i> , 64 S.W.3d 310, 314 (Mo. 2002).....	16
<i>Yahne v. Pettis County Sheriff Dept.</i> , 73 S.W.3d 717, 719 (Mo. App. W.D. 2002).....	21

UNITED STATES COURT OF APPEALS CASES

<i>Allison v. Department of Corrections</i> , 94 F.3d 494 (8th Cir. 1996).....	15
<i>Easley v. Snider</i> , 36 F.3d 297 (3rd Cir. 1994).....	18, 19, 21, 22
<i>Fisher v. Oklahoma Health Care Authority</i> , 335 F.3d 1175 (10 th Cir. 2003)	21, 25
<i>Frederick L. v. Dept. of Public Welfare</i> , 364 F.3d 487 (3 rd Cir. 2004).....	19
<i>Juvelis v. Snider</i> , 68 F.3d 648 (3rd Cir. 1995).....	16, 17, 19
<i>Langford v. Sherman</i> , 451 F.3d 496 (8th Cir. 2006).....	12, 30
<i>Layton v. Elder</i> , 143 F.3d 469 (8th Cir. 1998).....	15
<i>Radaszewski v. Maram</i> , 383 F.3d 599 (2004).....	11, 27, 28

UNITED STATES DISTRICT COURT CASES

Makin v. Hawaii, 114 F. Supp. 2d 1017 (D. Haw. 1999)..... 25

MISSOURI CASES

In re Estate of Shuh, 248 S.W.3d 82 (Mo.App. E.D. 2008) 14, 30, 31

Jensen v. Mo. Dept. of Health and Senior Servs., 186 S.W.3d 857 (Mo. App. W.D. 2006) 13, 31, 32

State ex rel. Sunshine Enterprises of Missouri, Inc. v. Board of Adjustment of City, 64 S.W.3d 310 (Mo. 2002) 15

Yahne v. Pettis County Sheriff Dept., 73 S.W.3d 717 (Mo. App. W.D. 2002) 20

STATUTES

Statutes

§ 208.900.1 RSMo (SUPP. 2005) 23
208.900.1 RSMO (SUPP. 2005) passim
28 C.F.R. § 35.130(b)(7)..... 27
28 C.F.R. § 35.130(b)(8)..... 20, 33
28 CFR § 35.130(d) 11, 24
42 C.F.R. §440.230(c) 33
42 C.F.R. §440.240 33
42 U.S.C. §1396(a)(10)(B)(i) 33
42 U.S.C.A. § 1396a(a)(17)(D) 32
42 U.S.C.S. § 1396d(a)(24) 30
Jensen v. Mo. Dept. of Health and Senior Servs., 186 S.W.3d 857, 862 (Mo. App. W.D. 2006)..... 13, 31
Makin v. Hawaii, 114 F.Supp.2d 1017, 1033 25

JURISDICTIONAL STATEMENT

Petitioner, Andrea Bechtel, appeals from a January 3, 2008, judgment of the Circuit Court of St. Louis County, as amended April 16, 2008, finding that the Respondent properly denied Petitioner the benefit of personal care assistance because she has been appointed a guardian. The circuit court found that § 208.900.1 RSMo (Supp. 2005) does not violate the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and the federal Medicaid Act.

This appeal challenges the validity of a Missouri state, § 208.900.1 RSMo (Supp. 2005). The Supreme Court of Missouri has exclusive appellate jurisdiction in all cases that involve the validity of a statute. *See* Mo. Const. Art. V, § 3. The Court of Appeals properly transferred this case to this Court. *See* Mo. Const. Art. V, § 11.

STATEMENT OF FACTS

Andrea Bechtel, Petitioner in the case *sub judice* and Appellant in this Court, is 39 years old. L.F. 74, ¶ 2. She is a person with both physical and mental disabilities. *Id.* Because of her disabilities, she requires a wheelchair to ambulate and assistance with all of her activities of daily living. *Id.*

Barbara Bechtel, Andrea's mother, has provided Andrea's physical care for Andrea's entire life and has been her court-appointed guardian since 1993. *Id.*; L.F. 42.

Barbara lives with and provides care for her daughter in a condominium they share. L.F. 75, ¶ 7. The care Barbara provides allows Andrea to remain in her home in the community rather than being placed in an institution at the expense of the state of Missouri. *Id.*; L.F. 32, 40.

Starting in 2000, Barbara began to receive limited benefits on Andrea's behalf for the care she provided to Andrea, which allowed Andrea to remain in the community. L.F. 74-75, ¶¶ 3, 7. Although Barbara provided the constant care Andrea required, she received approximately \$1,500 each month as compensation for six hours each day—a rate of about \$8.30 per hour. L.F. 75, ¶ 7. The benefits were received under the Personal Care Assistance program (hereinafter "Missouri PCA program") established by the legislature and codified at §§ 178.661-673 RSMo (2000). L.F. 74, ¶ 3. The Missouri PCA program is an optional program established under

Medicaid that offers financial assistance to persons with disabilities for personal care aides. *Id.* The purpose of the program is to promote the independence of individuals with disabilities in the community. *Id.* It was offered without respect to eligibility for Medicaid. *Id.* Andrea qualified for the program solely on the basis of her physical disabilities. *Id.*

The statutes establishing the Missouri PCA program were repealed in 2005 and replaced by § 208.900, *et seq.*, RSMo (Supp. 2005), effective August 29, 2005. L.F. 75, ¶¶ 4-5. The new statute screens out from eligibility for participation in the Missouri PCA program individuals with mental disabilities by excluding from participation “any individual with a legal limitation of his or her ability to make decisions, including the appointment of a guardian...” L.F. 75, ¶ 4; § 208.900.1 RSMo (Supp. 2005). Because Andrea’s mental disability had required appointment of a guardian, she was notified that her PCA benefits would be terminated. L.F. 75, ¶ 5. There had been no significant change in Andrea’s physical or mental condition. L.F. 76, ¶ 8. It is undisputed that Andrea would remain eligible for personal care benefits but for her mental status. *Id.*

The termination of Andrea from participation in the Missouri PCA program was appealed administratively. L.F. 75, ¶ 6. At the administrative hearing, Barbara explained that she might not be able to keep Andrea in her home without the PCA program’s benefits. L.F. 31-32. The benefits were

the only resource available to keep Andrea in the community rather than an institution. L.F. 75, ¶ 7. Without the PCA program, Andrea does not receive stable care and may not be able to keep up the payments on the specially equipped condominium she shares with her mother. L.F. 31-32.

The hearing officer found in favor of the Department of Social Services. L.F. 76, ¶ 9; L.F. 41-45; Appendix A4-8. The administrative hearing officer determined that under the statute at issue Andrea did not qualify for continued participation in Missouri PCA program because “*by definition* [a person with a guardian] does not meet the criteria regarding the ability to self direct.” L.F. 42, 44; Appendix A5, A7 (emphasis added). Andrea’s benefits were then terminated. L.F. 76, ¶ 11. A timely petition for review was filed in the Circuit Court for St. Louis County. L.F. 76, ¶ 10.

The amended petition for review did not challenge the factual findings of the administrative hearing officer. L.F. 47-49; L.F. 76, ¶12. Instead Andrea asserted that § 208.900.1 RSMo (Supp. 2005), which excluded her from participation in Missouri’s PCA program solely on the basis of her mental disability, violates the Medicaid Act (42 U.S.C. § 1396; 42 C.F.R. 440), the Rehabilitation Act of 1973 (29 U.S.C. § 794), and Title II of the Americans with Disabilities Act (42 U.S.C. § 12132). The state made no attempt in its Circuit Court filings to defend the statute against Andrea’s Rehabilitation Act and Americans with Disabilities Act challenges.

The Circuit Court initially entered its judgment on January 3, 2008. L.F. 85, Appendix A3. The Court did not specifically consider Andrea's challenges to § 208.900.1 RSMo (Supp. 2005) and found that the Department's decision "was made upon lawful procedure, was authorized by law, was not arbitrary or capricious or unreasonable, was not an abuse of discretion, and was ordered by competent and substantial evidence upon the whole record." *Id.*

Andrea filed a timely motion to amend the judgment or, in the alternative, for a new trial. L.F. 86. On April 16, 2008, the Circuit Court entered a judgment and order amending its January 3, 2008, order. L.F. 92-93; Appendix A9-10. By stipulation of the parties, the Court adopted the findings of fact submitted by Andrea. *Id.*; L.F. 74-76. The Court, without explanation, found that Andrea's termination from Missouri's PCA program did not violate the Medicaid Act, the Rehabilitation Act of 1973, and the Americans with Disabilities Act. *Id.* Finally, the Court reiterated its previous legal conclusions respecting the Department's decision. *Id.*

Andrea's notice of appeal was filed on April 23, 2008. L.F. 94. The appeal was originally filed in the Court of Appeals Eastern District. On June 26, 2008, the Court of Appeals granted Appellant's motion to transfer to this Court because the appeal challenges the validity of a Missouri statute.

POINTS RELIED ON

I. THE TRIAL COURT ERRED BY NOT FINDING THAT § 208.900.1 RSMO (SUPP. 2005) VIOLATED TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT, BECAUSE:

A. TITLE II OF THE ADA AND SECTION 504 OF THE REHABILITATION ACT BAN DISCRIMINATION OF A SUB-CLASS OF DISABLED PERSONS FROM A LARGER CLASS OF DISABLED PERSONS AND THE STATE OF MISSOURI DEFINED ELIGIBLE RECIPIENTS IN SUCH A WAY AS TO CATEGORICALLY DENY STATE BENEFITS TO THE MENTALLY DISABLED WHO WOULD OTHERWISE QUALIFY FOR STATE BENEFITS BASED ON A PHYSICAL DISABILITY.

42 U.S.C. § 12132

29 U.S.C. § 794

Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999).

Easley v. Snider, 36 F.3d 297 (3rd Cir. 1994)

B. TITLE II OF THE ADA REQUIRES THAT TREATMENT WHICH IS OFFERED BY THE STATE MUST BE OFFERED IN THE MOST COMMUNITY-INTEGRATED SETTING APPROPRIATE, AND THE STATE IS DENYING ASSISTANCE THAT WOULD ALLOW ANDREA TO LIVE IN THE COMMUNITY EVEN THOUGH IT WOULD BE REQUIRED TO PROVIDE BENEFITS TO HER WERE SHE TO ENTER AN INSTITUTION-BASED TREATMENT FACILITY.

28 CFR § 35.130(d)

Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999)

Radaszewski v. Maram, 383 F.3d 599 (7th Cir. 2004)

Fisher v. Oklahoma Health Care Authority, 335 F.3d 1175 (10th Cir. 2003)

**II. THE TRIAL COURT ERRED BY NOT FINDING THAT §
208.900.1 RSMO (SUPP. 2005) VIOLATED THE FEDERAL
MEDICAID ACT BECAUSE THE FEDERAL MEDICAID ACT
PROHIBITS DISCRIMINATION AGAINST RECIPIENTS SOLELY
BASED ON DIAGNOSIS, TYPE OF ILLNESS OR CONDITION AND
THE STATE OF MISSOURI HAS DEFINED ELIGIBLE
RECIPIENTS IN SUCH A WAY AS TO SCREEN OUT FROM
ELIGIBILITY PERSONS WITH MENTAL DISABILITIES WHO
WOULD OTHERWISE QUALIFY FOR STATE BENEFITS BASED
ON A PHYSICAL DISABILITY AND BECAUSE THE ACT’S OWN
ELIGIBILITY REQUIREMENTS MAKES NO DISTINCTION
BETWEEN RECIPIENTS WHO ARE ABLE TO “SELF DIRECT,”
OR NOT, OR WHO HAVE A GUARDIAN, OR NOT, SO THE
STATUTE CONFLICTS WITH AND IS CONTRARY TO FEDERAL
LAW AND IS PREEMPTED.**

42 U.S.C. § 1396 (a)(10)(B)(I)

42 C.F.R. § 440.240 (a),(b)(1).

Langford v. Sherman, 451 F.3d 496 (8th Cir. 2006)

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947)

ARGUMENT

I. THE TRIAL COURT ERRED BY NOT FINDING THAT § 208.900.1 RSMO (SUPP. 2005) VIOLATED TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT BECAUSE TITLE II OF THE ADA AND SECTION 504 OF THE REHABILITATION ACT BAN DISCRIMINATION OF A SUB-CLASS OF DISABLED PERSONS FROM A LARGER CLASS OF DISABLED PERSONS AND THE STATE OF MISSOURI DEFINED ELIGIBLE RECIPIENTS IN SUCH A WAY AS TO CATEGORICALLY DENY STATE BENEFITS TO THE MENTALLY DISABLED WHO WOULD OTHERWISE QUALIFY FOR STATE BENEFITS BASED ON A PHYSICAL DISABILITY AND BECAUSE TITLE II OF THE ADA REQUIRES THAT TREATMENT WHICH IS OFFERED BY THE STATE MUST BE OFFERED IN THE MOST COMMUNITY-INTEGRATED SETTING APPROPRIATE AND THE STATE IS DENYING ASSISTANCE WHICH WOULD ALLOW BECHTEL TO LIVE IN THE COMMUNITY EVEN THOUGH IT WOULD BE REQUIRED TO PROVIDE BENEFITS TO

**BECHTEL WERE SHE TO ENTER AN INSTITUTION-BASED
TREATMENT FACILITY.**

This case raises the important question of whether the state may discriminate amongst persons with physical disabilities by establishing eligibility requirements for participation in a program the state has established for persons with physical disabilities that screen out persons with mental disabilities. Because Missouri's requirement that participants in its PCA program *not* have a guardian appointed and because this requirement is not necessary to the program, the exclusion cannot withstand scrutiny under the federal laws that prohibit discrimination on the basis of disability.

By stipulation of the parties, the Circuit Court adopted the findings of fact proposed by Petitioner-Appellant Andrea Bechtel. L.F. 92. Accordingly, there is no factual dispute and the Circuit Court was not required to make any credibility judgments or weigh any evidence. The issue raised in this point is whether, based on those undisputed facts, the state violated the Americans with Disabilities Act (ADA) and the Rehabilitation Act. In determining whether a state law conflicts with a federal law, the review on appeal is *de novo*. *In re Estate of Shuh*, 248 S.W.3d 82, 84 (Mo.App. E.D. 2008); *see also State ex rel. Sunshine Enterprises of Missouri, Inc. v. Board of Adjustment of City*, 64 S.W.3d 310,

314 (Mo. 2002) (where the issue is whether or not a municipal ordinance conflicts with a state law, the review is *de novo*).

To establish a violation of Title II of the ADA, a plaintiff must show that:

(1) he is a qualified individual with a disability; (2) he was excluded from participation in or denied the benefits of public entity's services, programs, or activities, or was otherwise discriminated against by the entity; and (3) that such exclusion, denial of benefits, or other discrimination, was by reason of his disability.

Layton v. Elder, 143 F.3d 469, 472 (8th Cir. 1998). Section 504 of the Rehabilitation Act applies the same standards to entities that receive federal financial assistance. *See Allison v. Department of Corrections*, 94 F.3d 494, 497 (8th Cir. 1996); *see also Barnes v. Gorman*, 536 U.S. 181, 184-85 (2002) (Title II provides same rights, procedures, and enforcement remedies as the Rehabilitation Act); *Bragdon v. Abbott*, 524 U.S. 624, 631-32 (1998) (ADA incorporates substantive requirements of the Rehabilitation Act and its regulations). Since the Rehabilitation Act and the ADA are treated similarly by the courts, they will be discussed simultaneously.

A. THE TRIAL COURT ERRED BY NOT FINDING THAT § 208.900.1 RSMO (SUPP. 2005) VIOLATED TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF

THE REHABILITATION ACT, BECAUSE TITLE II OF THE ADA AND SECTION 504 OF THE REHABILITATION ACT BAN DISCRIMINATION OF A SUB-CLASS OF DISABLED PERSONS FROM A LARGER CLASS OF DISABLED PERSONS AND THE STATE OF MISSOURI DEFINED ELIGIBLE RECIPIENTS IN SUCH A WAY AS TO CATEGORICALLY DENY STATE BENEFITS TO THE MENTALLY DISABLED WHO WOULD OTHERWISE QUALIFY FOR STATE BENEFITS BASED ON A PHYSICAL DISABILITY.

Andrea Bechtel was categorically denied all PCA benefits by the state of Missouri solely because she is mentally disabled and, as a result of her mental disability, requires the care of a guardian. L.F. 75. According to the Americans with Disabilities Act (ADA) “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C.A. § 12132.

Under Title II of the ADA, once it is determined that a person has been denied benefits because of her disability, the question is whether that person is “otherwise qualified” for that program. *See Juvelis v. Snider*, 68 F.3d 648, 653 (3rd Cir. 1995) (internal citations omitted). “[A]n individual may be otherwise qualified in some instances even though he cannot meet

all of a program's requirements." *Id.* at 653. Further, "the benefit . . . cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made." *Alexander v. Choate*, 469 U.S. 287, 300 (1985) (decided prior to enactment of the ADA, but regarding the Rehabilitation Act's ban on discrimination in state Medicaid programs). When considering whether a person is "otherwise qualified" given a reasonable accommodation, a court must determine if the accommodation would be an undue burden on the state or change the essential nature of the program.

Prior to 2005, Andrea was considered a "qualified individual" and received assistance through Missouri's PCA program pursuant to §§ 178.661-667 RSMo (2000). L.F. 74. Andrea qualified for PCA benefits on the basis of her physical disability alone. L.F. at 75. In 2005, the state changed the definition of a "consumer" that is eligible to receive the benefit of the program to specifically exclude any persons with mental disabilities that result in "a legal limitation on his or her ability to make decisions, including the appointment of a guardian." § 208.900.1 RSMo (Supp. 2005). Since Andrea's mother is her appointed guardian, Andrea was terminated from participation in Missouri's PCA program because "*by definition* [a

person with a guardian] does not meet the criteria regarding the ability to self direct.” L.F. 42 (emphasis added).

By forcing Andrea and her guardian to choose between Andrea living in the community or receiving the medical benefits she needs as a result of her physical disabilities from the state, she is being treated discriminatorily because “[i]n order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice.” *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 601 (1999).

In *Easley v. Snider*, 36 F.3d 297 (3rd Cir. 1994), the Third Circuit determined that a very similar program to Missouri’s amended PCA program, which also had a mental alertness requirement, did not violate the ADA or the Rehabilitation Act. However, the court based its tolerance for the exclusion of the mentally disabled from the program on the erroneous basis that the “main thrust [of the ADA] is to assure handicapped individuals receive the same benefits as the non-handicapped,” and thus mistakenly concluded that the ADA does not protect one class of disabled from being treated differently from another class of disabled based on the disability. *Easley*, 36 F.3d at 305.

The rationale under which *Easley* permitted the discriminatory practice now adopted by Missouri has been undermined by the Supreme Court's interpretation of the ADA. *Easley* was decided before *Olmstead*. In *Olmstead*, the Supreme Court stated unequivocally that "the fact that one person in the protected class has lost out to another person in the protected class is . . . irrelevant," so long as that person has been discriminated against because of a disability, meaning that the state cannot discriminate between different classes of disabled individuals. *Olmstead*, 527 U.S. at 598 n.10 (internal citations omitted). Had *Easley* been decided subsequent to *Olmstead*, the court would have had to find that the program at issue in *Easley* discriminated against people with mental disabilities in violation of the ADA. For the same reason, Missouri's PCA program discriminates against persons with mental disabilities in violation of the ADA.

Once it is determined that Andrea is being discriminated against because of her disability in violation of the ADA, the government must accommodate her disability unless it is shown that "accommodating [Andrea] would require a fundamental modification of its program or impose an undue burden [on the state]." *Juvelis*, 68 F.3d at 653. That a reasonable accommodation would be a fundamental alteration or an undue burden is an affirmative defense that the state must assert. *Frederick L. v. Dept. of Public Welfare*, 364 F.3d 487, 492 (3rd Cir. 2004). The state failed

to raise either as a defense and has not presented even a scintilla of evidence of either.¹ L. F. at 65-70.

The reasonable accommodation sought is for the state to alter its definition of “self-direct”—requiring the personal direction of the assistant— so that “self-direct” only requires that the recipient have the means to provide for the direction of their care, which would include direction of care through a guardian or other surrogate in instances in which the individual has a mental disability. This accommodation would remove the state’s discrimination based solely on a disability and institute an individualized inquiry into whether a mentally handicapped individual can meet the requirements of the PCA program, which is required by the ADA. *See* 28 C.F.R. § 35.130(b)(8) (requiring that for eligibility requirements that screen out handicapped individuals to be valid, they must be necessary for the provisions of the program); *see also School Bd. v. Arline*, 480 U.S. 273, 287 (1987) (Rehabilitation Act requires an individualized inquiry to

¹ Under Rule 55.08, an affirmative defense is waived if not raised in the trial court. *Yahne v. Pettis County Sheriff Dept.*, 73 S.W.3d 717, 719 (Mo. App. W.D. 2002). Although the defense has been waived by the State, we proceed to show the affirmative defense to be without merit because the evidence establishes that the affirmative defense would have lacked merit even had it been raised.

determine an otherwise qualified candidate); *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 690 (2001) (applying “the ADA’s basic requirement that the need of a disabled person be evaluated on an individual basis”).

While the court in *Easley* found that mental awareness was a fundamental requirement to receive the intended benefits of the program, in the present case, Andrea was already receiving benefits from Missouri’s PCA program before an eligibility provision that screened out mentally handicapped individuals from those eligible to receive benefits was adopted. An individual’s long standing participation in a program from which they are later excluded because of an added requirement is evidence that the new requirement is not fundamental to the program. *Cf. Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175, 1183 (10th Cir. 2003) (finding that where providing unlimited prescriptions has been the fundamental nature of the program, even withstanding alterations, providing unlimited prescriptions remains the fundamental nature of the program). Unlike the Pennsylvania program, Missouri’s PCA program was originally designed to cover all individuals who could benefit from self-directed care within their home and was only later modified to categorically exclude all individuals with mental disabilities requiring a legal guardianship.

More fundamentally, the *Easley* court failed to recognize that mentally handicapped individuals can benefit from the greater control they possess

through their guardians in a self-directed care program. Instead the *Easley* court suggested that allowing mentally handicapped to partake in such a program would render null the program's goal of greater independence. 36 F.3d at 303. This misperception of the abilities of persons with mental disabilities is precisely the evil that the ADA and the Rehabilitation Act targeted. *See Arline*, 480 U.S. at 287. This case illustrates the point well. While Andrea is in need of a legal guardian because of her mental disability, she nevertheless greatly benefits from living in the community, despite her physical disabilities, where she has a degree of control (with the assistance of her guardian) in deciding what she wants to eat, deciding what she wants to wear, and participating in social events such as bowling and swimming regularly. L.F. 53. Since these benefits are similar to those enjoyed by the non-mentally handicapped persons with physical disabilities, it would not be a fundamental alteration to the goals and purposes of Missouri's PCA program to accommodate Andrea's disability. Because Andrea was receiving PCA assistance prior to the alteration of the definition of "consumer" that screened her out of eligibility, it is apparent that the state itself believed she was able to enjoy the intended benefits of the program.

Finally, accommodating Andrea in the PCA program would not be an undue burden on the state of Missouri. While the Supreme Court in *Olmstead* determined whether an undue burden would be imposed on the

state by looking at the obligations the state may be subject to from the class of individuals they would be required to treat and comparing that cost to the overall budget of the state, such an inquiry is not necessary here. 527 U.S. at 504. Andrea was already a part of the program, and there is no evidence that her participation in the program was a burden on Missouri's PCA program. L.F. 74. Further, even where there is some burden on the state, the Supreme Court in *Olmstead* still required the state to adopt a non-discriminatory method for determining who should receive the benefits the state has the ability to provide, such as a wait list. *Id.* at 605. In this case, however, Andrea was previously accommodated by Missouri's PCA program and there is a dearth of evidence suggesting that continuing to accommodate her would burden the state.

B. THE TRIAL COURT ERRED BY NOT FINDING THAT § 208.900.1 RSMo (SUPP. 2005) VIOLATED TITLE II OF THE AMERICANS WITH DISABILITIES ACT BECAUSE TITLE II OF THE ADA REQUIRES THAT TREATMENT WHICH IS OFFERED BY THE STATE MUST BE OFFERED IN THE MOST COMMUNITY-INTEGRATED SETTING APPROPRIATE AND THE STATE IS DENYING ASSISTANCE WHICH WOULD ALLOW BECHTEL TO LIVE IN THE COMMUNITY EVEN THOUGH IT WOULD BE REQUIRED TO PROVIDE BENEFITS TO BECHTEL WERE SHE

TO ENTER AN INSTITUTION-BASED TREATMENT FACILITY.

Assuming, *arguendo*, that the requirement that excluded Andrea from continuing her participation in Missouri's PCA program is determined to be a fundamental element of the program, Andrea is nevertheless discriminated against unlawfully because she is being forced to face the prospect of unnecessary institutional care because of her mental disability.

It is undisputed that if Andrea continues to be denied PCA benefits, she may lose her specially designed condominium in the community and be forced into institutional care at the expense of the state. L.F. 32, 75. The regulations developed to implement Title II of the ADA prohibit unjustified institutionalization: "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 CFR § 35.130(d). According to the Supreme Court in *Olmstead*, "Congress explicitly identified unjustified 'segregation' of persons with disabilities as a form of discrimination." 527 U.S. at 599 (internal citations omitted). Requiring Andrea to face the prospect of segregation from the community by way of institutionalization is a type of discrimination Congress enacted the ADA to end. It is not significant that Andrea is not currently seeking release from a facility, but it is significant that "the only alternative for [Andrea] presently is

institutionalization if [she] seek[s] treatment under the statute.” *Makin v. Hawaii*, 114 F.Supp.2d 1017, 1033 (D. Haw. 1999). “There is nothing in the . . . regulations that limits protection to persons who are currently institutionalized. . . . [and] nothing in the *Olmstead* decision supports a conclusion that institutionalization is a prerequisite to enforcement of the ADA’s integration requirement.” *Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175, 1181 (10th Cir. 2003).

The Supreme Court has clearly stated that unwarranted institutionalization is discrimination, even absent a “comparison class” that has received community-based care. *Olmstead*, 527 U.S. at 598. Discrimination occurs by “perpetuating unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life,” and by “diminish[ing] the everyday life activities of individuals.” *Id.* at 601-02.

In this case there is a comparison class, and it is treated differently. A person with physical disabilities identical to Andrea’s would receive the care in the community through Missouri’s PCA program that Andrea is requesting. In contrast, Andrea has been determined ineligible for the same care she needs for the same physical disabilities simply because she also has a mental disability that necessitated appointment of a guardian.

Even if this Court determines that Missouri’s PCA program does not

provide a comparison class with which to compare Andrea, it is still discriminatory because, “[i]n order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life.” *Id.* at 602.

To curtail discrimination against people with disabilities, the Supreme Court in *Olmstead* established a three-part test to determine when a state is required to provide community-based treatment:

States are required to provide community-based treatment for persons with mental disabilities when the State’s treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.

Id. at 607. The stipulated findings of fact demonstrate Andrea meets each of *Olmstead*’s criterion.

It is undisputed that Andrea does not oppose treatment for her disabilities in her home; this case is an attempt to vindicate her right to receive the assistance she needs because of her physical disabilities *and* remain in the community. What is more Andrea has already been determined eligible for treatment in her home under the Missouri’s PCA program (prior to its modification to screen out the mentally disabled), so the

state's treatment professionals clearly found it appropriate for her to receive care within her home. The only real issue is whether a reasonable accommodation can be made that would allow Andrea to be treated in a community-based setting.

Even if Andrea is not "otherwise qualified" for participation in Missouri's PCA program because of her mental disability, the state must still reasonably accommodate her treatment in a community-based setting. An accommodation is considered reasonable unless that accommodation would "fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7). While a state is not required to create entirely new benefits for the disabled, "[n]othing in the regulations . . . [requires] proof that the services a plaintiff wishes to receive in a community-integrated setting already exist in exactly the same form in the institutional setting." *Radaszewski v. Maram*, 383 F.3d 599, 611 (2004). If a similar service is provided, the state may be required to alter that service in order to accommodate the disabled. *See Alexander*, 469 U.S. at 300 (finding that while there is no requirement to create a new program, a state may be required to make a reasonable modification of an existing program).

The parties stipulated, and the Circuit Court found, that Andrea's mother may not be able to keep Andrea in her home without the PCA benefits. L.F. 75. Missouri will provide Andrea institutionalized care if she

cannot remain in her home. Because Missouri will provide her with institutionalized care, it would not be a fundamental alteration to require the state to provide for similar community-based care. *See Olmstead*, 527 U.S. at 607 (where states already provide institutional care for the mentally handicapped, they must provide community-based care when appropriate); *see also Radaszewski*, 383 F.3d at 614 (where the state would provide similar twenty-four hour care in an institution, they are required to accommodate similar services in a community-integrated setting).

The state's treatment professionals have found Andrea's community-based treatment appropriate, she does not oppose community-based treatment, and the state would provide similar treatment in an institutional setting. There is a paucity of evidence that requiring Missouri to provide Andrea with community-based treatment would be an undue burden on the state. Accordingly, even if the state is not required to allow Andrea's participation in Missouri's PCA program, it is still required to provide personal care assistance to her in her home through some other program. The state's denial of Andrea's request to be treated in a community-based setting is discriminatory and violates Title II of the ADA.

The judgment of the circuit court should be reversed and this matter remanded so that court may direct that Andrea's benefits be reinstated and determine the appropriate back pay and attorneys' fees.

II. THE TRIAL COURT ERRED BY NOT FINDING THAT § 208.900.1 RSMO (SUPP. 2005) VIOLATED THE FEDERAL MEDICAID ACT BECAUSE THE FEDERAL MEDICAID ACT PROHIBITS DISCRIMINATION AGAINST RECIPIENTS SOLELY BASED ON DIAGNOSIS, TYPE OF ILLNESS OR CONDITION AND THE STATE OF MISSOURI HAS DEFINED ELIGIBLE RECIPIENTS IN SUCH A WAY AS TO SCREEN OUT FROM ELIGIBILITY PERSONS WITH MENTAL DISABILITIES WHO WOULD OTHERWISE QUALIFY FOR STATE BENEFITS BASED ON A PHYSICAL DISABILITY AND BECAUSE THE ACT'S OWN ELIGIBILITY REQUIREMENTS MAKES NO DISTINCTION BETWEEN RECIPIENTS WHO ARE ABLE TO "SELF DIRECT," OR NOT, OR WHO HAVE A GUARDIAN, OR NOT, SO THE STATUTE CONFLICTS WITH AND IS CONTRARY TO FEDERAL LAW AND IS PREEMPTED.

The federal Medicaid Act's PCA provisions make no distinction between recipients who are able to "self-direct" and those who are not. Nor does the Medicaid Act permit a limitation of benefits to persons who have a guardian appointed to assist them because of a mental disability. To the contrary, the Medicaid Act prohibits such discrimination. Because §

208.900.1 RSMo (Supp. 2005) restricts Andrea's access to Missouri's PCA program in a manner not permitted by and, in fact, contradictory to the Medicaid Act, the statute is preempted and invalid.

In determining whether a state law conflicts with a federal law, the review on appeal is *de novo*. *In re Estate of Shuh*, 248 S.W.3d 82, 84 (Mo. App. E.D. 2008).

The federal Medicaid Act provides money to the states to aid them in providing medical assistance to persons who would not otherwise be able to afford medical care. *Langford v. Sherman*, 451 F.3d 496, 504 (8th Cir. 2006). Missouri participates in Medicaid, generally, and in its allowance of benefits for personal care assistance. The Act's definition of "medical assistance," includes "personal care services furnished to an individual who is not an inpatient or resident of a hospital, nursing facility, intermediate care facility for the mentally retarded, or institution for mental disease..." 42 U.S.C.S. § 1396d(a)(24). Clearly the Act contemplates the allowance of personal care assistance to persons with severe mental disabilities, severe enough that they might otherwise be institutionalized in a facility for persons with mental disabilities.

The Act's definition of who is eligible for personal care services makes no distinction between individuals who are capable of self-direction of their caregiver and those who are not. The definition makes no

distinction between persons who have a guardian, or not. In these respects, § 208.900.1 RSMo (Supp. 2005) restricts Andrea's access to Missouri's PCA program in a manner not permitted by and, in fact, contradictory to, the Medicaid Act. Accordingly, to the extent the statute renders individuals ineligible to receive services simply because they have been appointed a guardian (and especially without any individualized assessment of their ability to direct their caregiver), the statute is preempted and invalid.

Although states are permitted some flexibility in fashioning PCA programs, it is axiomatic that a state's own rules and restrictions may not conflict with the federal law. *Jensen v. Mo. Dept. of Health and Senior Servs.*, 186 S.W.3d 857, 862 (Mo. App. W.D. 2006); *Shuh*, 248 S.W. at 84 ("Such plans and standards must comport with all federal statutory and regulatory requirements."). In *Jensen*, the plaintiff had been receiving benefits under Missouri's PCA program to compensate her mother, who was serving as her caregiver. 186 S.W.3d at 859. Litigation was precipitated by the Department of Health and Senior Services' decision to reduce her PCA eligibility from seven days per week to five. *Id.* The basis for the reduction was that the plaintiff could not show that it would be an undue hardship on her parents to provide her care two days of every week without compensation. *Id.* The Court of Appeals held that the consideration of a family's resources conflicted with the federal Medicaid Act, which specifies

that an individual's financial responsibility may not be taken into account under the circumstances. *Id.* at 862.² As the Court recognized, "While states are not required to participate in Medicaid, the courts have determined that once a state elects to participate in the program, it must comply with all statutory and regulatory requirements imposed by federal law." *Id.* at 860.

Andrea was stripped of PCA benefits when § 208.900.1 RSMo (Supp. 2005) was enacted. The statute altered the eligibility requirements for Missouri's PCA program to render ineligible persons like Andrea, who has a guardian appointed to assist her with decision making. Missouri now limits access to personal care benefits in a manner not authorized by the federal Medicaid Act. The additional requirement imposed by Missouri in this case (*i.e.*, that one not have a guardian or conservator), like the additional qualification imposed in *Jensen*, is not authorized by the federal law.

Section 208.900.1 RSMo (Supp. 2005) conflicts with the federal Medicaid Act in another respect as well. The Act broadly prohibits discrimination among prospective recipients based on medical condition. Under the Act, "[T]he medical assistance made available to any individual [. . .] shall not be less in amount, duration, or scope than the medical assistance

² A family's resources may be taken into account where the services are being provided to an individual under the age of 21 or to a spouse. *Id.*; see 42 U.S.C.A. § 1396a(a)(17)(D).

made available to any other such individual.” 42 U.S.C. §1396(a)(10)(B)(i). *See also* 42 C.F.R. §440.240 (“The plan must provide that the services available to any individual in the following groups [the categorically needy] are equal in amount, duration, and scope for all recipients within the group”), 42 C.F.R. §440.230(c) (“The Medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service under §§ 440.210 and 440.220 to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition”).

Under the amended eligibility requirements, Andrea’s personal care assistance was removed because her mental disability requires her to have the assistance of a guardian. If she did not have a mental disability, then she would not have a guardian. If she did not have a guardian, then she would continue to enjoy the benefit of Missouri’s PCA program. Other individuals with the same physical conditions as Andrea, but who do not have a mental disability, are allowed the benefit of personal care assistance. The requirement that a recipient of personal care assistance both have no guardian and be able to “self direct” screens out from eligibility persons with mental disabilities. Screening out in this fashion constitutes discrimination on the basis of disability. *See, e.g.*, 28 C.F.R. § 35.130(b)(8) (ADA regulation insuring that eligibility requirements that screen out handicapped individuals must be necessary).

The additional eligibility requirements for the PCA program imposed by Missouri in 2005 are preempted by the federal Medicaid Act. They work to both create limitations on eligibility for the PCA program that are not authorized by the federal Act and discriminate against individuals with mental disabilities by screening them out of eligibility for assistance with their physical disabilities that they would otherwise receive. The judgment of the circuit court should be reversed and this matter remanded so that court may direct that Andrea's benefits be reinstated and determine the appropriate back pay and attorneys' fees.

CONCLUSION

For the foregoing reasons Appellant requests this Court reverse the judgment of the Circuit Court, declare § 208.900.1 RSMo (Supp. 2005) invalid because it violates federal law, remand the case with directions to reinstate Appellant's benefits and determine the appropriate back pay and attorneys' fees, and grant Appellant such other and further relief as is just and proper under the circumstances.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06; (3) contains 6,422 words, exclusive of the sections exempted by the rules, determined using the word-count feature of Microsoft Office Word 2003. The undersigned further certifies that the accompanying floppy disk has been scanned and was found to be virus-free.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of this brief and a copy of the brief of floppy disk were served upon the counsel identified below by United States Mail, postage prepaid, on July 17, 2008:

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