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
The Honorable Robert S. Cohen

BRIEF OF RESPONDENT

JEREMIAH W. (JAY) NIXON
Attorney General

JAMES LAYTON
State Solicitor
Missouri Bar No. 45631

LASANDRA F. MORRISON
Assistant Attorney General
Missouri Bar No. 45917
615 E 13th Street, Suite 401
Kansas City, Missouri 64106
Telephone: 816-889-5000
Fax: 816-889-5006
E-mail: lasandra.morrison@ago.mo.gov

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES……...3

STATEMENT OF FACTS……..6

STANDARD OF REVIEW……...10

ARGUMENT…….11

I. Even after the 2005 amendments, Missouri provides personal care services of the type received by Andrea Bechtel to all those who need it, regardless of any mental disability……..11

II. None of the statutes Andrea Bechtel invokes prevent the Agency from drawing a line, in terms of supervising personal care providers, between those who can supervise such providers themselves and those who cannot…….21

CONCLUSION……..25

CERTIFICATE OF SERVCE AND OF COMPLIANCE WITH RULE 84.06(B)……...26

TABLE OF AUTHORITIES

Cases

Asbury v. Lombardi, 846 S.W.2d 196 (Mo. banc 1993)……11

Beal v. Doe, 432 U.S. 438; 97 S.Ct. 2366, 53 L.Ed.2d 464 (1977)……...23

Chrismer v. Missouri State Div. of Family Services, 816 S.W.2d 696 (Mo. App. W.D. 1991)……10

Easley v. Snider, 36 F.3d 297 (3rd Cir. 1994)……..18, 19

Gillmore v. Illinois Department of Human Services, 843 N.E.2d 336 (Ill. 2006)…….23

McKenzie v. State of Missouri, Department of Social Services, Division of Family Services, 983 S.W.2d 196 (Mo. App. E.D. 1998)……...10

Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999)……...18, 19, 20

Richard Lowe v. Dept. of Social Services, Division of Medical Services, WD69057…….9

Schweiker v. Gray Panthers, 453 U.S. 34 (1981)…….....23

State v. Shaw, 847 S.W.2d 768 (Mo. banc 1993)……..11

Suffian v. Usher, 19 S.W.3d 130 (Mo. banc 2000)……10

TGB, Inc. V. City of St. Louis Board of Building Appeals, 154 S.W.3d 353 (Mo. App. E.D. 2004)……10

Thomas v. MO Dept. of Social Services, 805 S.W.2d 286 (Mo. App. W.D. 1991)……...10

Weaver v. Reagen, 886 F.2d 194 (8th Cir.1989)……...23

Westin Crown Plaza Hotel v. King, 664 S.W.2d 2 (Mo. banc 1984)……10

Missouri Statutes

Mo. Rev. Stat. § 178.661 (2000)……..6, 7

Mo. Rev. Stat. § 178.673 (2000)…….....6

Mo. Rev. Stat. § 208.152.1(14) (Supp. 2005)……*passim*

Mo. Rev. Stat. § 208.900 (Supp. 2005)..……*passim*

Mo. Rev. Stat. § 208.906.(1) (2000)……....9

Mo. Rev. Stat. § 208.927 (2000)……..6

Mo. Rev. Stat. § 208.985 (2000)……..6

Mo. Rev. Stat. § 536.140.0(1) (2000)……10

Missouri Regulations

Mo. Code Regs. Title 13 C.S.R. 70-91.010.....*passim*

Mo. Code Regs. Title 19 C.S.R. 15-8.100.....*passim*

Mo. Code Regs. Title 19 C.S.R. 15-8.200(6)……12

Federal Statutes

29 U.S.C. §§ 701-7961……..22

42 U.S.C. § 1396……23

42 U.S.C. § 1396d(a)(24)……...17

42 U.S.C. §§ 12101-12213 (2000 ed. and Supp. II)……21, 22

Federal Regulations

42 C.F.R. § 440.167(a)(2)……..17

42 C.F.R. § 440.230(b)……..24

Other Authorities

Senate Bill 539…….7

STATEMENT OF FACTS

Statutory Background

In Missouri, personal care services are available through either the consumer-direct services program model or the agency-directed program model. Under the consumer-directed services program model the services are provided pursuant to § 208.900 to § 208.927 and the disabled individual is responsible for directing their own care. These services are defined as routine tasks provided to meet the unmet needs required by a physically disabled person to enable him or her to live independently. 19 C.S.R. 15-8.100(1) (L). Under the agency-directed model the services are provided pursuant to § 208.152.1(14) and the agency is responsible for directing the care of these individuals. These services are defined as medically-oriented, maintenance services to assist with the activities of daily living. 13 C.S.R. 70-91.010(2). Individuals meeting Medicaid eligibility requirements in the state of Missouri are eligible for the same personal care services under two different statutes.

In 2005, the statute governing the consumer-directed services program was amended[1]. This statute was previously titled the Personal Care Assistance program and found at § 178.661 to § 178.673, RSMo. To receive personal care services under the old statute, an individual must have simply been physically disabled. § 178.661(1). Once

[1] Prior to 2005, the statutes governing consumer-directed services were sections 178.661 to 178.673, RSMo. After 2005 the statutes governing these services are found at found at sections 208.900 to 208.985 (Supp. 2005).

Senate Bill 539 passed, in order for an individual to receive personal care services under the consumer-directed model an individual must be physically disabled and have no ***legal limitation*** of their ability to make decisions, including the appointment of a guardian or conservator. § 208.900(1). Personal care services have remained available and unchanged under § 208.152.1(14)[2].

Case Background

Andrea Bechtel suffers from cerebral palsy, epilepsy (grand mal type), mental retardation and aphasia. (L.F. 52). As a result, Ms. Bechtel's mother, Barbara Bechtel, has been appointed her legal guardian. (L.F. 38). Ms. Bechtel previously received personal care services through the consumer-directed services program (hereinafter "CDS Program") and in August of 2005 she was receiving those services. (L.F. 28). Ms. Bechtel was notified of changes in the law that occurred in 2005, and the new eligibility

[2] In order to be eligible for personal care services under the Agency model, persons must be assessed, approved and case managed by the Agency or its designee. These individuals must require an institutional level of care, as determined by the Agency, be approved, and agree to an in home assessment of his/her physical, social and functional ability to benefit from personal care services. 13 C.S.R. 70-91.010(1)(A).

requirements by the Department of Health and Senior Services[3] (hereinafter "Agency"). (L.F. 28) Ms. Bechtel's mother contacted the Agency regarding the eligibility requirements and the Agency ascertained that Ms. Bechtel's mother was her legal guardian. (L.F. 28) On August 29, 2005, the Agency sent Ms. Bechtel a letter terminating her personal care services through the CDS program because she had a legal guardian. (L.F. 39). After termination of her personal care services through the CDS program, the Agency provided Ms. Bechtel these same services through the agency program. Under this program the Agency supervised her care rather than Ms. Bechtel through her mother. (L.F. 32, 7-8) Three different provider agencies reported to Ms. Bechtel's home to provide the same services previously provided by her mother. (L.F. 32, line 7-8).

At the hearing, conducted November 20, 2005, the hearing officer considered evidence from the Agency, Ms. Bechtel's guardian, and Ms. Bechtel's aunt. (L.F. 14-37). The hearing officer rendered a decision on August 3, 2006, affirming the Agency's decision to discontinue Ms. Bechtel's personal care services through the CDS program. (L.F. 44)

---

[3] The Department of Health and Senior Services, Division of Senior and Disability Services, rather than the Department of Social Services as captioned in Ms. Bechtel's appeal, is the Agency that terminated the services at issue in the current appeal.

Ms. Bechtel, through her legal guardian, appealed this decision to the Circuit Court of St. Louis County on October 10, 2006. (L.F. 46). On April 16, 2008, that Court entered its final Judgment and Order, and found §208.900 does not violate federal standards, including the Rehabilitation Act, and Title II of the Americans with Disabilities Act. (L.F. 92-93). The trial court further held that the Agency action was rendered based upon lawful procedure, authorized by law, not arbitrary or capricious, or unreasonable, not an abuse of discretion, and supported by competent and substantial evidence upon the whole record. (L.F. 93). Ms. Bechtel appealed. (L.F. 94).

Relevant Court of Appeal's Activity

On August 19, 2008, the Court of Appeals, Western District, handed down a decision in *Richard Lowe v. Department of Social Services, Division of Medical Services*, WD69057. Mr. Lowe, like Ms. Bechtel, previously received personal care services under the consumer-directed model. In 2006 the Agency reviewed his case to determine if he remained eligible for services through this program, as required by §208.906.1(1). The Agency determined that his mother served as his appointed legal guardian; therefore he was not eligible. As a result, Mr. Lowe was removed from the consumer-directed program. He appealed this determination, which the Director affirmed, and was later reversed by the trial court. The Court of Appeals concluded Mr. Lowe was in fact ineligible for consumer-direct services and affirmed the Agency decision.

STANDARD OF REVIEW

Generally, a reviewing court would review the findings of the administrative agency, not that of the circuit court. *Chrismer v. Missouri State Div. of Family Services*, 816 S.W.2d 696, 700 (Mo. App. W.D. 1991); *Thomas v. Missouri Dept. of Social Services*, 805 S.W.2d 286, 288 (Mo. App. W.D. 1991); *McKenzie v. State of Missouri, Department of Social Services, Division of Family Services*, 983 S.W.2d 196, 198 (Mo. App. E.D. 1998).

However, Ms. Bechtel does not challenge the administrative agency's determination. Instead she claims that the statute the Agency applied violates the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and the Federal Medicaid Act. Such alleged violations are within the permissible scope of judicial review of an administrative decision. Section 536.140.0(1), RSMo 2000; *See TGB, Inc. V. City of St. Louis Board of Building Appeals*, 154 S.W.3d 353, 355 (Mo. App. E.D. 2004).

"Statutes are presumed to be constitutional. Accordingly, the burden to prove a statute unconstitutional rests upon the party bringing the challenge. This Court will not invalidate a statute unless it clearly and undoubtedly contravenes the constitution and plainly and palpably affronts fundamental law embodied in the construction." *Suffian v. Usher*, 19 S.W.3d 130, 134 (Mo. banc 2000) (citations omitted). Further, this Court will "resolve all doubt in favor of the act's validity" and may "make every reasonable intendment to sustain the constitutionality of the statute." *Westin Crown Plaza Hotel v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984). Next, this Court must not address the constitutionality of statutes in isolation, but rather construe the whole statute and do so in

light of a strong presumption of a statute's validity. *State v. Shaw*, 847 S.W.2d 768, 776 (Mo. banc 1993). If a statutory provision can be interpreted in two ways, one constitutional and the other not constitutional, the constitutional construction must be adopted. *See Asbury v. Lombardi*, 846 S.W.2d 196, 199 (Mo. banc 1993)

ARGUMENT

The error in Ms. Bechtel's argument arrives abruptly, in the very first sentence of her substantive argument: "Andrea Bechtel was categorically denied all [personal care assistance] 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." Appellant's Brief (hereinafter "App. Br.") at 16. In fact, Andrea Bechtel has *not* been categorically denied any benefits. She remains eligible for the personal care services she received before the statute changed in 2005. Her real complaint appears to be that Ms. Bechtel's mother (who is also her legal guardian) can no longer hire herself to provide that service. Nothing in the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, or the Medicaid law gives her the right to have her mother direct payment of State funds provided for PC services to herself or to anyone else.

I. Even after the 2005 amendments, Missouri provides personal care services of the type received by Andrea Bechtel to all those who need it, regardless of any mental disability. (Response to Ms. Bechtel's Points I and II)

Current Missouri law authorizes personal care services for eligible Medicaid recipients under two different statutes, with two different approaches for securing and supervising those providing personal case.

The first approach is the consumer-directed model, *i.e.*, the Agency delegates to the person actually receiving the care responsibility for hiring and supervising the personal care provider. That portion of the personal care program – the only portion addressed in appellant Bechtel's brief – is created by § 208.900 and regulated by 19 C.S.R. 15-8.200(6). In directing their own care under the consumer-directed model, the disabled individual must be an active participant in their care and the supervision of their personal care provider. For example, under 19 C.S.R. 15-8.200(6) the consumer is responsible for selecting, hiring, training, and supervising their own personal care provider. The consumer must also prepare biweekly time sheets; ensure units submitted for reimbursement do not exceed the amounts authorized; promptly notify the Agency of changes affecting their plan of care; promptly notify the Agency of changes in their place of residence; and promptly notify relevant personnel of any problems relating to the quality of services received by his personal care provider. 19 C.S.R. 15-8.200(6).

Logically, the consumer-directed model is not available to everyone; it is restricted to those who are themselves capable of fulfilling the supervision requirements. Thus excluded from the consumer-directed model are those "with a legal limitation of his or her ability to make decisions, including the appointment of a guardian or conservator." § 208.900(1). Such persons have been adjudicated to be incapable of performing the kind of functions that are delegated in the consumer-directed model. Indeed, appellant Bechtel does not ever claim that she is capable of performing all or even any of those functions; her argument is simply that her guardian – her mother – can perform those functions for her. She thus attacks the statute, since she is unable to claim that the statute, if valid as

applied, permits the delegation of responsibility from the Agency to a private party other that the consumer of services herself.

In levying her attack, appellant Bechtel claims that she is, by virtue of § 208.900, ineligible to continue receiving personal care services. But to make that claim she must ignore a second approach in Missouri law for providing such benefits: the agency-directed model. Under that approach, authorized in § 208.152.1(14) and regulated in 13 CSR 70-91.010, the agency responsible for providing and funding the personal care services retains supervisory responsibility, instead of delegating it to the consumer of the services. Personal care services are available under this model just as they are through the consumer-directed model. But if appellant Bechtel receives services under this model, she is not responsible for supervising a personal care provider or making sure the provider's timesheets are accurate. Rather, the agency is responsible for that supervision and direction. That the two approaches are regulated by different statutes and regulations does not provide appellant Bechtel with a basis for her claim of discrimination. Rather, the personal care services authorized under the two approaches, at least to the extent implicated in this appeal, are the same.

The statutory authorization in §§ 208.900 and 208.152.1(14), are further defined at 19 C.S.R. 15-8.100(O)(1) through (8) and 13 C.S.R. 70-91.010(2)(B)(1) through (7), respectively. Though there may be semantic differences between the two approaches, the statute and regulations pertinent to the agency-directed model provide for the same services that appellant Bechtel received through the consumer-directed model. personal care services under the consumer-directed model include assistance with routine tasks

and instrumental activities of daily living including: bowel and bladder elimination; dressing and undressing; moving into and out of bed; preparing and consuming food; bathing and grooming; shopping/transportation; maintenance and use of prostheses, aids, equipment and other similar devises; and ambulation, housekeeping, or other functions of daily living based on an independent living philosophy. 19 C.S.R. 15-8.100(O)(1) through (8). Personal care services provided under the agency-directed model are defined as services that are medically-oriented, maintenance services that assist with the activities of daily living which include assistance with: dietary needs, dressing and grooming, bathing and personal hygiene, toileting and continence, mobility and transfer, administration of medication, and medially related household task and approved homemaker chores. 13 C.S.R. 70-91.010(2)(B)(1) through (7).

Appellant Bechtel would receive the same services under the agency-directed model as she previously received under the consumer-directed model. The only difference is that these services will now be directed by the agency, rather than the consumer. It is now the agency's responsibility, through contract providers, to hire an individual to provide personal care services, supervise that individual, insure that person is paid for hours worked, and handle the day-to-day delivery of these services. 13 C.S.R. 70-91.010(3). Contrary to appellant Bechtel's assertion, personal care services are provided to all persons found to be in need of these services as an alternative to institutional care. *See* 13 C.S.R. 70-91.010(1)(A).

That the statute contemplates delegation only to those consumers capable of handling delegation should hardly be surprising. When the agency directs the care of a

disabled individual under the agency-directed model, the agency can work to ensure individuals incapable of making decisions regarding their care do not become a victim of abuse or fraud. According to the Center for Disease Control[4], people with disabilities are 4 to 10 times more likely to become a victim of violence, abuse, or neglect than persons without disabilities. This victimization can occur anywhere; however, two of the most common places for victimization are in hospitals and at home[5]. Victims usually know the person who harms them, and family members as well as personal home care aides have been reported to perpetrate both emotional abuse and sexual violence against persons with disabilities. It is because of these staggering facts that the agency must take the step of personally supervising and managing the activities of personal care aides for those disabled individuals that have been found not to have the cognitive abilities to manage their own care.

Appellant Bechtel's mother testified at the hearing that she provided excellent care to her daughter (L.F. 31, line 17) – and the Agency is not suggesting otherwise. But the

---

[4] Centers For Disease Control and Prevention, *Victimization of Persons with Traumatic Brain Injury or Other Disabilities: A Fact Sheet for Professional*, http://www.cdc.gov/ncipc/tbi/FactSheets/Victimization TBI_Fact%20Sheet 4Pros.pdf.

[5] Centers For Disease Control and Prevention, *Victimization of Persons with Traumatic Brain Injury or Other Disabilities: A Fact Sheet for Professional*, http://www.cdc.gov/ncipc/tbi/FactSheets/Victimization TBI_Fact%20Sheet 4Pros.pdf.

question before the legislature when it modified the consumer-directed program statute was not the actions of a particular guardian; it was the protection of the disabled generally. And the unfortunate reality is that many disabled individuals suffer from abuse at the hands of their care-givers, even though the care-givers are often family members. The legislature's actions in removing from the consumer-directed program those who are personally incapable of supervising their caregivers – but allowing them to continue receiving services through the agency-directed program – is not discriminatory as appellant Bechtel's brief suggests, but rather it promotes a public policy of providing adequate care for those most vulnerable individuals in our community.

Appellant Bechtel's real claim seems to be not that the Agency will no longer, based on her mental condition, provide her services she needs, but that if she accepts services under § 208.152.1(14), her mother will not be her personal care provider and will no longer receive State funds. *See* App. Br. at 27. That is true; the statutes do provide consumers who can direct their own care with options that the agency does not have in terms of hiring personal care providers. Under the consumer-directed program, a "personal care attendant" is defined as any person, other than the consumer's spouse, who performs personal care services for a physically disabled individual. 19 C.S.R. 15-8.100(M). The agency-directed model does not permit the agency to hire "any person"; instead it imposes particular requirements on the agency. An "in-home personal care worker" under the agency-directed model must be at least 18 years old; able to read, write and follow directions; have at least six (6) months' paid work experience as an agency homemaker, nurse aide or household worker, or at least one (1) year of experience in

caring for children, sick or aged individuals, or have successfully completed formal training; and may not be a family member of the recipient for whom personal care is to be provided. 13 C.S.R. 70-91.010(3)(K).

If appellant Bechtel receives PC services under the agency-directed model, the State will not pay her mother to provide those services. This prohibition is found both in the state regulation, the federal Medicaid Act governing the program, and the regulations for the Medicaid Act. Specifically, 42 U.S.C. § 1396d(a)(24) states that personal care services are provided by the Act, however those services must be provided by a qualified individual *who is not a member of the individual's family*. Section 42 C.F.R. §440.167(a)(2) further defines family member to mean a legally responsible relative. Both Congress and the Missouri legislature prohibit family members from serving as personal care providers under the agency-directed model.

Appellant Bechtel's concern extends, of course, beyond the question of precisely who can be hired to provide her care. She states in her brief that 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 benefit." App. Br. at 27. Apparently that is based on the assumption that her mother, without the income she receives from the State for being hired as appellant Bechtel's personal care provider, would be unable to pay for her condominium. That argument ignores, of course, the fact that having been freed from six hours of care a day (L.F. 32, line 15) by having someone else provide care under the agency-directed model, appellant Bechtel's mother could presumably work elsewhere.

Moreover, the facts the parties stipulated to are not quite as appellant Bechtel characterizes them. Appellant Bechtel's proposed Findings of Facts at the trial court, specifically paragraph 7, stated that at the hearing *appellant Bechtel's mother testified that* she "feared she could not keep Andrea in their home" without these benefits. (L.F. 75, emphasis added.) The parties did not stipulate as to the truth of this statement – *i.e.*, as to whether appellant Bechtel's mother "feared" or whether she could actually stay in her home – but simply that appellant Bechtel's mother testified in this regard. At the hearing, appellant Bechtel's mother did testify that without the money she received in payment for her service as her daughter's personal care provider she may lose the condominium she bought in her daughter's name. (L.F. 32, line 1) But personal care services are not provided as a source of employment for family members. These services are provided to ensure the personal care needs of the disabled individual are met and the disabled individual is allowed to remain in the community. If appellant Bechtel is unable to direct her own care, as a Missouri probate court has already found (L.F. 38), the State, through the appropriate agency, must take responsibility for making sure her needs are met by her personal care provider.

Appellant Bechtel's determination to ignore the availability of agency directed benefits carries over into her analysis of caselaw that she says supports her position. She describes *Easley v. Snider*, 36 F.3d 297 (3rd Cir. 1994) as a case that involves a "very similar program to Missouri's amended PCA program" and states that *Easley* would have been decided differently if decided after *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 592-593 (1999). App. Br. at 19. In *Easley*, the state of Pennsylvania's Attendant Care

Services Act provided attendant care services to eligible individuals and excluded from the program persons who were physically disabled, but not mentally alert. *Id.* at 299. So far as we can tell from the *Easley* opinion, Pennsylvania only offered Attendant Care Services under this Act and thus, any individual wishing to receive attendant services who was not "mentally alert," was without recourse. This case is not similar to our case on that critical aspect, because PC services in the state of Missouri are available to all eligible Medicaid recipients under either § 208.900 or § 208.152.1(14). In *Easley* the court simply did not deal with the question of whether a state could provide the same services through consumer- and agency-directed approaches.

Appellant Bechtel also cites to *Olmstead* in support of her argument that if she is denied services under section 208.900 she will be forced into an institution. But because she never addresses the availability of agency-directed services, she never explains why removing her from the consumer-directed program would itself lead to that result. Again, if appellant Bechtel accepts services under § 208.152.1(14) these services will allow her to remain in the community; outside an institution.

Moreover, the *Olmstead* holding addresses a unique and dissimilar set of facts. *Olmstead* involved two women voluntarily admitted for psychiatric treatment and detained in those psychiatric facilities in spite of a finding by state mental health professionals that their needs could be meet in a community-based program setting. *Id.* at 593. The state argued in *Olmstead* argued that it was unable to provide community-based services to the petitioners because of inadequate funding; therefore it was inadequate funding, not their disability, that accounted for their retention in the psychiatric facility.

Id. The Supreme Court did not find merit in this argument and held the institutionalization of mentally handicapped individuals when community-based options are available and would not fundamentally alter the state's services and programs, was a violation of the ADA. To quote, the Supreme Court held, in a very limited manner:

> For the reasons stated, we conclude that, under Title II of the ADA, 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. This is a very limited holding and in no way applicable in the preset case as the Agency has not proposed institutionalizing appellant Bechtel but has instead made available services to assist her in remaining in the community. The Agency has neither concluded nor suggested that appellant Bechtel cannot continue to receive personal care services under Medicaid. And *Olmstead* simply does not address the agency- versus consumer-directed distinction.

II. None of the statutes appellant Bechtel invokes prevent the Agency from drawing a line, in terms of supervising personal care providers, between those who can supervise such providers themselves and those who cannot.

Appellant Bechtel argues violations of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and the Federal Medicaid Act in her allegations of discrimination. None of these statutes, however, prevent the Agency from drawing a

line, in terms of supervising personal care providers, between those who can supervise such providers themselves and those who cannot.

Title II of the American's with Disabilities Act of 1990, as amended, 104 Stat. 337, 42 U.S.C. §§ 12101-12213 (2000 ed. and Supp. II) (hereinafter "ADA") provides that "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. § 12132 (2000 ed.). A "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). And a "public entity" is defined to include "any State or local government" and "any department, agency, ... or other instrumentality of a State," 42 U.S.C. § 12131(1).

In enacting the ADA, Congress found that some 43,000,000 Americans had one or more physical or mental disabilities. 42 U.S.C. § 12101(a)(1). Nothing in the ADA prevents the Agency from drawing a line between those who can supervise their personal care providers and those who cannot in order to protect members of this large community living in the state of Missouri. Both the consumer- and agency-directed models provide the "services, programs, or activities" that appellant Bechtel seeks. To suggest, as appellant Bechtel must do to make her claim, that the ADA requires that states delegate

the same level of responsibility to everyone eligible for such services regardless of their mental ability to handle that responsibility makes no sense at all.

Section 504 of the Rehabilitation Act of 1973, 87 Stat. 394, 29 U.S.C. §§ 701-7961 (hereinafter "Section 504"), prohibits discrimination by entities receiving federal funding. Specifically, 29 U.S.C. §794 provides that no "otherwise qualified individual" with a disability shall, solely by reason of their disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. A "program or activity" is defined to include the operations of a department or agency of a state or local government. 29 U.S.C. § 794(b)(1)(A).

One of the stated purposes of Section 504 is to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society, through independent living services. 29 U.S.C. § 701(b)(1)(B). Nothing in this statute prevents the Agency from providing these independent living services in a manner that protects those most vulnerable disabled individuals by drawing a line in terms of who can supervise personal care providers and who can not. Again, it would make no sense to interpret Section 504 to require that the states not only provide the same benefits to all recipients, but that they treat them all the same in terms of supervision, *i*.e, that the states delegate responsibility for supervising personal care services either to all those eligible for such care or to none of them.

The Medicaid program was established in 1965 as Title XIX of the Social Security Act, later codified at 42 U.S.C. § 1396, et. seq. *Schweiker v. Gray Panthers*, 453 U.S. 34, 36 (1981). This program has at its purpose and objective "the provision of medical assistance to needy persons" whose income and resources are insufficient to meet the expenses of health care. 42 U.S.C. § 1396. Furthermore, Congress predicated the Medicaid program upon the concept of "cooperative federalism" under which, both federal and state governments set policy for Medicaid. *Gillmore v. Illinois Department of Human Services*, 843 N.E.2d 336, 338-39 (Ill. 2006). States design their own Medicaid plans, setting reasonable standards for eligibility and assistance. *Schweiker*, 453 U.S. at 36.

Though the federal government permits states to exercise their discretion in administering their Medicaid programs, the broad requirements imposed by the federal statutes and regulations temper the discretion of the states. *Id*. at 37. While a state has considerable discretion to fashion medical assistance under its Medicaid plan, this discretion is constrained by the reasonable-standards requirement. *See Beal v. Doe*, 432 U.S. 438, 444, 97 S.Ct. 2366, 53 L.Ed.2d 464 (1977); *Weaver v. Reagen*, 886 F.2d 194, 197 (8th Cir.1989) (interpreting the reasonable-standards provision to require states to provide "medically necessary" treatment to comply with Medicaid's objectives). Finally, states may not arbitrarily deny or reduce the amount, duration, or scope of services required under the Medicaid Act because of an individual's diagnosis, type of illness, or condition. 42 C.F.C. § 440.230(c).

Appellant Bechtel argues that her personal care services were denied or reduced because of her mental disability. App. Br. at 33. But again, the change was not in the benefits the Agency made available to her, but in the method of supervising the providing of those benefits. As to appellant Bechtel, the Agency has not removed or reduced these services and nothing in the Medicaid Act, or any cases interpreting the reasonableness and comparability standard of the Act, prohibit the Agency from making a distinction between when personal care services may be directed by the disabled individual and when it is necessary for a state agency to the take the responsibility for directing that care.

Missouri has chosen to serve the purposes of the ADA, Section 504, and Medicaid by allowing those individuals who suffer from a physical disability, but have the cognitive ability to direct their own care, to direct their own care. These individuals, even though disabled, are allowed to use their strengths; that is their cognitive abilities, to actively participate in their own care. The State is concerned, however, about the potential for abuse in cases where the individual lacks certain cognitive abilities and therefore has placed the responsibility for supervising and directing the care of those individuals with the state agency.

CONCLUSION

For the reasons stated above, the Court should uphold Section 208.900, RSMo as constitutional and affirm the decision of the Department of Health and Senior Services, Division of Senior and Disability.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

_____
JAMES LAYTON
State Solicitor
Missouri Bar No. 45631

LaSandra F. Morrison #45917
Assistant Attorney General
Missouri Attorney General's Office
Fletcher Daniels State Office Building
615 E. 13th Street, Suite 401
Kansas City, Missouri 64106
Phone: 816-889-5000
Fax: 816-889-5009
hcs@ago.mo.gov

ATTORNEYS FOR RESPONDENT

CERTIFICATION OF SERVICE AND OF COMPLIANCE WITH RULE 84.06(B) AND (C)

The undersigned hereby certifies that on this ___ day of August 2008, one true and accurate copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid to:

Anthony E. Rothert
American Civil Liberties Union of Eastern Missouri
454 Whittier Street
St. Louis, Missouri 63108

and

Nancy E. Emmel
Sindel & Emmel
7711 Bonhomme, Suite 815
Clayton, Missouri 63105

ATTORNEYS FOR APPELANT

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that the brief contains 5,107 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

_____

State Solicitor