

Case No. 19-1244

**In the United States Court of Appeals
For the Seventh Circuit**

KAREN VAUGHN,

Plaintiff/Appellee,

v.

JENNIFER WALTHALL, in her official capacity as Secretary of the Indiana Family
and Social Services Administration, *et al.*,

Defendants/Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA, NO. 1:16-CV-03257-JMS-DLP
HONORABLE JANE MAGNUS-STINSON

APPELLEE'S SUPPLEMENTAL BRIEF

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This supplemental brief addresses the Court’s question whether Indiana’s recent amendment to its Aged & Disabled Waiver “may be an appropriate accommodation under the Americans with Disabilities Act, 42 U.S.C. § 12132, to allow Vaughn to receive the benefit of the amendment.” Doc. 37 at 2. The answer is yes. The Participant-Directed Home Care Service (“PDHCS”) described in the amendment adds to the State’s existing options for providing for Ms. Vaughn’s home health services. In fact, no accommodation should be required to extend PDHCS to Ms. Vaughn, as she meets the PDHCS eligibility criteria. Moreover, the amendment demonstrates that the nurse licensing requirements upon which the State relies do not support a fundamental alteration defense. In the absence of any evidence to support a fundamental alteration defense, this is “not a close case.” *Steimel v. Wernert*, 823 F.3d 902, 915 (7th Cir. 2016). This Court should affirm.

I. Ms. Vaughn Can Access Participant-Directed Home Care Services without Accommodation.

As approved, PDHCS should be available to Ms. Vaughn, without modification. *See* Indiana Family & Soc. Servs. Admin., Aged & Disabled 1915(c) Waiver Amendment, IN.0210, as amended IN.0210.R06.03 (May 26, 2020) (“Waiver Amendment”), <https://www.in.gov/fssa/files/Aged%20and%20Diasabled-%20Self%20directed%20care%20amendment.PDF>. As described in the Waiver Amendment, PDHCS is for individuals who: (a) are diagnosed with a chronic medical condition that may require up to 24 hours of continuous care, (b) can safely receive care at home, rather than an institution, as evidenced through a physician’s

order, (c) have no available family or natural supports to assume the role of care giver, (d) are twenty-one years or older, (e) live in a non-congregate setting, and (f) are able to direct their own care and willing to accept the risks and responsibilities associated with employing caregivers and directing their own care. *Id.* at 115.

Ms. Vaughn meets each of these requirements. She is diagnosed with a chronic, stable medical condition that requires up to twenty-four hours of continuous care; her doctors have confirmed that her care can safely be provided at home. She lives alone without anyone to assume the role of caregiver and is over 21 years old. She has repeatedly asked to direct her own care, presented evidence that she is capable of training and directing her own staff, and is willing to take on the risks of doing so. *See Appellee's Br.* at 1-3; ECF 116-1 at 8, ECF 36-2 at 41-44; Vaughn App. at 10-13. Finally, Ms. Vaughn lives in one of the two zip codes in which the State is offering PDHCS, zip code 46204.¹

The Waiver Amendment specifies that PDHCS must be provided pursuant to an individualized plan of care and coupled with the use of State Plan Home Health Skilled Care services. Waiver Amendment at 115. These requirements do not pose a barrier. The plan of care would be developed through an individualized, person-centered planning process, which is a required component for all 1915(c) waiver participants. *See* 42 C.F.R. § 441.301(c); *see also* SA at 18 (describing a plan of care as a “collaborative effort between Ms. Vaughn, her healthcare providers and [the

¹ The draft amendment only covered zip code 46202. Ind. Family & Social Servs. Admin., Proposed Aged & Disabled Waiver Amendment (Dec. 3, 2019). After receiving public comments, the State added zip code 46204. Waiver Amendment at 9.

State]”). The authorization for State Plan Home Health Skilled Care services included in the plan of care would be completed concurrently. Ms. Vaughn is eligible for and has been approved for this service in the past. *See* SA at 4, 7 (describing receipt of “prior authorization” State Plan services); *cf. Steimel*, 823 F.3d at 907-08 (describing relationship of waiver and state plan services and process for developing the individualized plan of care).

The person-centered planning process would also determine details about how PDHCS would be implemented in Ms. Vaughn’s particular circumstances. Through this planning process, Ms. Vaughn and the State would develop a plan of care that identifies the mix of skilled and unskilled hours of services that she needs. *See* Waiver Amendment at 14 (“individual users will vary in the mix of services,” and “the state will approve an appropriate ratio to meet each participant’s individual needs.”). The Waiver Amendment describes different rates for skilled and unskilled hours, *id.* at 188, references an individualized “blended rate,” *id.* at 14, and requires use of a “flexible budgeting method,” *id.* at 13. Thus, based on the mix of hours described in the plan of care, the State would set an overall budget, individualized for Ms. Vaughn for PDHCS. *Id.* at 14, 188, 200.

Once determined, Ms. Vaughn could use the budget “to pay the rate of [her] choice to staff, limited only by allocated budget.” *Id.* at 13, 14; *see also id.* at 200. Ms. Vaughn could “hire either a licensed professional through a home health agency, an independent, licensed professional, or a non-clinical competency-trained unlicensed professional.” Waiver Amendment at 115. Through PDHCS, Ms. Vaughn

could, therefore, continue using home health agencies, hire licensed nurses directly, without going through a home health agency (self-directed nursing services); hire non-nurses directly and train the non-nurses to provide the services she needs (combining self-direction and nurse delegation); or directly hire a combination of licensed and unlicensed workers to fill any of her hours. In sum, the State's approval of a plan using PDHCS would guide the services Karen can self-direct, the amount and to whom she may pay for those services, and which services are through the state plan and not self-directed.

The person-centered planning process functions precisely to identify gaps and issues at the onset, *i.e.* what Karen needs to remain at home, her preferences, and what services her person-centered plan of care will use to meet those needs and preferences. 42 C.F.R. § 441.301(c)(2). This process is also used if there are changes in circumstances or problems in practice, for example if problems arose finding service providers. *Id.* § 441.301(c)(3). Thus, any new requests for accommodation in access to, or use of, PDHCS would likely arise and be addressed in the first instance through the person-centered planning process.

In sum, the Waiver Amendment as written should meet Karen's needs. Any barriers attributable to how the State "develops policies regarding, and executes its waiver programs," that are not described in the Waiver Amendment itself—for instance limiting the number of skilled hours she may use, or requiring a particular mix of skilled and unskilled hours—should be within the State's control to accommodate without fundamental alteration. *Steimel*, 823 F.3d at 918.

II. The Waiver Amendment Refutes the State's Fundamental Alteration Defense.

Rather than focusing on costs or impacts on other individuals with disabilities, the State's fundamental alteration arguments have centered on the nurse licensing requirements and the fact that the requested accommodations would require modifications to the State's Aged & Disabled Waiver. State Br. at 22-29; State Reply Br. at 5-6; *see also*. SA at 19, 26, 52 (District Court findings that the State repeatedly failed to present any evidence related to costs). The Waiver Amendment makes the very changes the State claimed would be a fundamental alteration and removes any remaining concerns about the permissibility of using self-direction or nurse delegation.

First, the Waiver Amendment permits Ms. Vaughn to hire and self-direct licensed nurses to perform skilled services. Waiver Amendment at 115 (participant may hire "an independent, licensed professional" to perform "skilled or attendant care activities or both"). Thus, she can hire skilled nurses directly, rather than go through a home health agency.² *See* Appellee's Br. at 3; *see also* State Reply at 18 (describing self-directed nursing services in the proposed Waiver Amendment). Now that the Waiver Amendment has been approved, there should be no barrier to Karen utilizing self-directed nursing services, unless the State creates new

² In response to Ms. Vaughn request for precisely this accommodation, the State repeatedly denied her request. *See* Appellee Br. at 3, 9, 11, 13, 30, 32-33. The State's only argument has been that her accommodation would require CMS to approve a change to its Aged & Disabled Waiver. *See* State. Br. at 29; State Reply Br. at 5. *But see Steimel*, 823 F.3d at 918 (holding CMS-approved Waiver must be modified to comply with integration mandate); Appellee Br. at 29-30. That has now happened.

restrictions not contained in the text of the Waiver Amendment.

Second, the Waiver Amendment permits participants to delegate nursing services to non-medical professionals. In its reply brief and at oral argument, the State asserted that the Waiver Amendment would not allow unskilled caregivers to perform skilled nursing services. *See* State Reply Br. at 18. However, the Waiver Amendment does allow this: “Participant-Directed Home Care Service (PDHCS) is a health-related service that can be performed by either licensed medical personnel or trained non-medical personnel. . . . This service can provide skilled or attendant care activities or both.” Waiver Amendment at 115. Participants may hire “a non-clinical competency-trained unlicensed professional” to perform the PDHCS services. *Id.*; *see also id.* at 188 (PDHCS is provided by either a licensed or “trained non-medical professional and is provided for the primary purpose of meeting chronic *medical* needs.”) (emphasis added).³

Finally, as Ms. Vaughn has already shown, the remaining barriers the State cited to establish a fundamental alteration defense—the Indiana Medicaid Policy Manual and the Nurse Practice Act and implementing regulations—do not prevent the State from allowing Ms. Vaughn to utilize nurse delegation, either through the PDHCS Waiver Amendment or as a reasonable accommodation. *See* Appellee’s Br. at 31-35, 41; *see also* Ind. Code §§ 25-23-1-27.1(b)(9), 12-10-17.1-5 (permitting

³ PDHCS does have some exclusions—*i.e.*, the “administration of level II, III, IV, and V medications,” *id.* at 115. To the extent Ms. Vaughn may need administration of such medications, they can be scheduled during any State Plan Home Health Skilled Care hours in the plan of care. Assistive technology may also be used to address drug administration barriers.

personal care worker to perform “health-related services” for individuals “in need of self-directed in-home care.”). Even if some changes to the State’s policies were required, the Waiver Amendment underscores what the District Court found: the limitations on which services could be performed only by nurses were entirely within the State’s control and the State was “painting itself into a corner and then lamenting the view.” SA 27 (District Court citing *Steimel*, 823 F.3d at 918).

CONCLUSION

The State has many options available, with and without modification, to accommodate Karen’s central request for accommodation: to receive the health services she needs at home instead of institutions—which are more dangerous than ever due to the pandemic. The Waiver Amendment adds one more option to the list. As with the various other options Karen has presented, nothing in the District Court’s injunction prevents the State from authorizing PDHCS now.⁴ *See* Appellee’s Br. at 40-43. The Court should affirm the injunction as-is, leaving it to the State to determine how best to accommodate Karen to ensure she remains at home.

Dated: July 21, 2020

Respectfully submitted,

/s/ Elizabeth Edwards
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⁴ To the extent the State believes the injunction bars it from utilizing the PDHCS to provide Karen’s care—and, to be clear, it does not—the appropriate course would be to move the District Court to modify the injunction based on changed factual circumstances. Fed. R. Civ. P. 60(b).

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and type-style requirements of Fed. R. App. P. 32(a)(6) because it was prepared using a proportionally spaced typeface, Microsoft Word, in 12-point Century Schoolbook font (11-point font in footnotes). This brief contains 1,876 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Elizabeth Edwards
Elizabeth Edwards

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2020, I electronically filed the foregoing Brief of Appellees with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system on July 21, 2010. I certify that all of the listed participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Elizabeth Edwards
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