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COURT OF APPEALS  
STATE OF NEW YORK

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MATTER OF MHLS,

Appellant,

-against-

NO. 28

DELANEY,

Respondent.

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20 Eagle Street  
Albany, New York  
March 17, 2022

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Appeal number 28, Matter of  
2 MHLS v. Delaney.

3 Counsel?

4 MR. STOCKWELL: Good afternoon, Your Honors. May  
5 it please the court, I am Shannon Stockwell of the Mental  
6 Hygiene Legal Service, on behalf of petitioner-appellant,  
7 Oliviah C.C. I would respectfully request two minutes'  
8 time rebuttal.

9 CHIEF JUDGE DIFIORE: Yes, sir, you have two  
10 minutes.

11 MR. STOCKWELL: This - - - the issue on this  
12 appeal is whether a developmentally disabled child can sue  
13 the state to enforce her right to receive approved Medicaid  
14 waiver services in order to obtain her discharge from a  
15 hospital emergency room where she was held for thirty-five  
16 days.

17 Plaintiff urges the court to reverse the  
18 Appellate Division's opinion and order below, dismiss or  
19 deny the - - - the state's motion to dismiss, and remand to  
20 Supreme Court on the reinstated petition.

21 The state clearly has obligations to people with  
22 developmental disabilities participating in the Medicaid  
23 waiver. In particular, under Mental Hygiene Law 13.07, the  
24 state is required to provide services, including care and  
25 treatment, and to ensure that such services of - - - are of



1 high quality and effectiveness and that the personal and  
2 civil rights of persons receiving such services are  
3 protected.

4 JUDGE TROUTMAN: Counsel? Did - - - did counsel  
5 below, on behalf of petitioner, ask that the matter be  
6 dismissed?

7 MR. STOCKWELL: I don't know that there was a  
8 formal motion to dismiss. But they - - - they - - - in  
9 their papers, they indicated that there was a failure to  
10 state - - - state a claim. And that's how Supreme Court  
11 treated the - - -

12 JUDGE TROUTMAN: But didn't the court initially  
13 have a conditional order, and the court was going to hold  
14 the matter in abeyance, and then counsel came in and asked  
15 for dismissal?

16 MR. STOCKWELL: I - - - I have to confess it was  
17 a little unclear how we got to dismissal. But certainly,  
18 the Supreme Court entered - - - entered an order denying  
19 all of petitioner's claims on the merits, and we took an  
20 appeal accordingly. And - - - and throughout the - - - the  
21 plea - - - the appellate process, the state took the  
22 position that we failed to state a claim upon which relief  
23 could be granted.

24 So we would submit that the Appellate Division  
25 wrongfully failed to employ the typical motion to dismiss



1 analysis, granting us every - - - every favorable inference  
2 and taking our allegations as true.

3 Moving on, the major problem with the Appellate  
4 Division's decision below is that the - - - the court found  
5 that there's no private right of action under the - - - the  
6 Medicaid reasonable promptness provision. Six circuits'  
7 court of appeal have all determined that - - - that such  
8 provision is privately enforceable, unanimous, with no - -  
9 -

10 JUDGE GARCIA: But Counsel, is - - - I know  
11 there's one, and I think it's the Sixth Circuit that came  
12 later, but at least five of those are before Armstrong,  
13 right? Here.

14 MR. STOCKWELL: Oh, sorry. Sorry.

15 JUDGE GARCIA: Okay. It's a hard one. But five  
16 of those cases, I think, are before Armstrong. The Sixth  
17 Circuit, I think, comes out after Armstrong, but it doesn't  
18 really address it. And it seems there is language in  
19 Armstrong that makes your argument more difficult.

20 MR. STOCKWELL: I think that the - - - there has  
21 been a tightening up of, with Armstrong, the - - - the  
22 private rights of action under the Medic - - - in the  
23 Medicaid - - - vari - - - various provisions in the  
24 Medicaid Act. But there - - - there are eighty of them.  
25 And Armstrong dealt with the equal access provision, which



1 is completely distinct from the reasonable promptness  
2 provision.

3 I think that the Supreme Court really had a hard  
4 time. The majority of pre - - - Supreme Court felt that  
5 the language in the equal access provision, Medicaid Act,  
6 was judicially unadministrable because it was judgment  
7 related. I think that the question of whether services are  
8 delivered to a person with reasonable promptness,  
9 certainly, is something that is within the wheelhouse of -  
10 - - of a judge.

11 And - - - and the Centers for Medicare or  
12 Medicaid Services, in fact, had outlined a - - - a five-  
13 factor test in its Olmstead Update number 4 that really  
14 simplifies the matter. And I - - - I would submit that  
15 certainly, Waskul is the only case since Armstrong where -  
16 - - where a circuit court has held that reasonable  
17 promptness provision is privately enforceable.

18 But there's - - - there's no reason for the - - -  
19 for the Appellate Division to deviate from that, and  
20 certainly, no - - - no - - - under the circumstances of  
21 this case, where we're - - - we're pre-trial, for the court  
22 to make - - - put itself out there and find that - - - that  
23 it's not privately enforceable made no sense under the  
24 circumstances. And it's really an outlier.

25 And the state has urged the court to essentially



1 abstain from hearing this, the issue, because it's subject  
2 to dispute in the - - - in the circuit's court of appeal.  
3 But I - - - I submit that that's not true. There's  
4 unanimous authority, at this point.

5 JUDGE CANNATARO: Counsel, the - - - the  
6 Appellate Division, in its writings, seems to suggest that  
7 Armstrong sort of changed the game on this private right of  
8 action. Is it - - - is it your position that we're still  
9 using the same set of standards that were articulated in  
10 Gonzaga and the cases before that, or - - - or does  
11 Armstrong - - - does Armstrong even add anything new to the  
12 analysis, is what I'm asking?

13 MR. STOCKWELL: I think with Arm - - - Armstrong  
14 flowed from Gon - - - Gonza - - - Gonzaga, and there's  
15 certainly, like I said earlier, been - - - been a - - - a  
16 kind of a - - - a restrict - - - restricting of - - - of  
17 private rights of action in Supreme Court jurisprudence.

18 JUDGE CANNATARO: So is it the unadministrability  
19 of the statute that still controls, or is - - - is - - - is  
20 it more than that?

21 MR. STOCKWELL: That's the - - - that's the law  
22 of Armstrong. And I think that that's the - - - that that  
23 - - - and it - - - our - - - as with the plaintiffs in  
24 Armstrong, our client sought relief in equity, so we're not  
25 - - - we're not subject to statutory requirement. We - - -



1 and - - - and the - - - the court's reasoning in Armstrong  
2 was that in equity, the two issues that the - - - that  
3 courts need to look at are whether there was a intent to  
4 restrict relief and - - - and that - - - and that the  
5 Centers for Medicare and Medicaid Services can hold back  
6 money from the states if they violate a provision.

7 But also, the court said that that wasn't the  
8 only - - - the end of the ball game, so to speak, that  
9 there is also the question of whether the - - - the  
10 provision is judicially unadministrable, which, obviously,  
11 here is - - - is clearly not - - - not the case. And I  
12 would actually submit that the equal access provision is  
13 administrable as well, but that's not either here nor the  
14 other - - -

15 JUDGE CANNATARO: That's another case.

16 MR. STOCKWELL: Yes, certainly.

17 I do want to move on. In the interests of time,  
18 I want to get into the admin - - - ADA claims as well. The  
19 state has an obligation to ensure that services are  
20 delivered to Medicaid waiver recipients in the most  
21 integrated setting. Clearly, that didn't happen here. My  
22 client was sent - - - she lived in - - - in a hospital  
23 emergency - - - in emergency room for thirty-five days.  
24 It's - - - it almost speaks for itself.

25 But also, the - - - the - - - the question that -



1 - - that the state had - - - employs methods of  
2 administration that subject people like my client to  
3 discrimination, in this case, they've placed - - -

4 JUDGE WILSON: That's - - - that's - - - that's  
5 Count VII, I think. And I don't actually understand that.  
6 So if you - - - what is the discrimination?

7 MR. STOCKWELL: That she's - - - it - - - it's  
8 Olmstead, Your Honor. She's - - - she's - - - she was  
9 subjected to unnecessary isolation in the hospital ER,  
10 where she should have been living in the community,  
11 receiving services - - -

12 JUDGE WILSON: That sounds like the integration  
13 claim, though.

14 MR. STOCKWELL: That is the inte - - -  
15 integration.

16 JUDGE WILSON: Oh, so I'm asking that - - - the  
17 integration claim is Count VI.

18 MR. STOCKWELL: Yeah. The - - - they're - - -  
19 they're - - - they're kind of tie - - - tied together. I  
20 mean, the - - - the - - - the courts - - - the - - - the  
21 state's reliance on the private sector to - - - to deliver  
22 serve - - - services to individuals is a - - - is an  
23 arrangement that - - - that results in discrimination to  
24 people like my client. And - - - and so that was - - -  
25 they're - - - they're - - - they're tied together, in a





1 sense.

2 JUDGE WILSON: Yeah. I'm - - - Counsel, I - - -  
3 I'm not an expert on the ADA, but discrimination, to me,  
4 sounds like as compared to some other group.

5 MR. STOCKWELL: Well, it - - - it flows from  
6 Olmstead, the - - - the 1999 U.S. Supreme Court decision  
7 where the court held that unjustified isolation of disabled  
8 folks is discrimination. And she was - - - in - - - in  
9 this case, my client was - - - was isolated in a hospital  
10 ER when she had been approved for community habilitation  
11 and respite services that would allow her to live in the  
12 community, with - - - with her family, with - - - with  
13 supports in place.

14 JUDGE RIVERA: So Counsel, if I can interrupt you  
15 on that point - - - I'm on the screen.

16 MR. STOCKWELL: Sure.

17 JUDGE RIVERA: Is your point that she is treated  
18 differently from adults who would have the same types of  
19 disabilities or other children with those disabilities, who  
20 might have otherwise had easier access to the services?

21 MR. STOCKWELL: Well, certainly, she's treated  
22 differently from adults because the State of New York,  
23 through - - - through its - - - both through state  
24 operations and through its partnerships with the not-for-  
25 profit sector, certainly do provide respite and community



1 habilitation services to adults. So she's treated  
2 differently from adults, in that - - - in that respect.

3 JUDGE WILSON: But does that state an ADA claim?

4 MR. STOCKWELL: It's - - - it certainly does.  
5 It's a methods of administration that they - - - well, it's  
6 - - - it's actually comparability violation under the  
7 Medicaid Act as well. The - - - the state is required to  
8 treat all service recipients in the waiver the same way.  
9 They - - - they have to be able to access all the services  
10 on the same - - - same level.

11 JUDGE WILSON: That's a - - - that's a Medicaid  
12 requirement?

13 MR. STOCKWELL: That - - - that - - - that is.  
14 That - - - that is, Your Honor. But - - -

15 JUDGE SINGAS: So Counsel, what relief are you  
16 looking for?

17 MR. STOCKWELL: Under the circumstances, we're -  
18 - - we're - - - we're seeking reversal of the Appellate  
19 Division's decision, denial of the state's motion to  
20 dismiss, and remand to Supreme Court on the - - - on the  
21 reinstated petition. We - - - there's many factual issues  
22 in this case that needed to be fleshed out before we - - -  
23 we could - - - could move forward. And it was - - - it's  
24 completely improper for the courts below to not employ - -  
25 - to employ the traditional standard review on a motion to



1 dismiss.

2 And we - - - we would submit that if we had been  
3 able to engage in fact-finding, we could have articulated a  
4 claim for appropriate injunctive relief. And that's - - -

5 JUDGE WILSON: That's actually something that  
6 puzzled me a little bit about - - - maybe a lot, actually,  
7 about the Appellate Division decision, which is I  
8 understood your complaint and your argument now to be  
9 asking for a chance to prove a variety of things, not that  
10 you've proven them. And I read the Appellate Division  
11 decision - - - not all of it, but part of it - - - to be  
12 treating this as if it was a mandamus to compel the  
13 government to do very specific things - - -

14 MR. STOCKWELL: Um-hum.

15 JUDGE WILSON: - - - which those two things don't  
16 seem to me to mesh.

17 MR. STOCKWELL: Yeah.

18 JUDGE WILSON: But you couldn't - - - you  
19 couldn't get to the point of even thinking about what the  
20 relief is unless you had actually proven something.

21 MR. STOCKWELL: That's right. There's no facts  
22 in the case, at this - - - this point. The Supreme Court  
23 held that our claims could not stand, and the Appellate  
24 Division affirmed on the merits. So we - - - we had - - -  
25 and we never asked - - - treated this as a mandamus to



1           compel. We - - - we - - - we had argued that - - - that  
2           the state's failure to provide these services to my - - -  
3           to my client were arbitrary, capricious, and contrary to  
4           law. That was - - - it's clearly - - -

5                   JUDGE RIVERA: Okay. But - - - but Counsel - - -  
6           again, I'm on the screen. Just - - - I just want to  
7           clarify this. I understood your argument to be that the  
8           state, because of the choices it's made in - - - in - - -  
9           in this particular case - - - and there are other children  
10          who seem to fall within this same unfortunate situation of  
11          the extensive delays, and you have the hospital saying - -  
12          - and they end up in the ER and wards where they shouldn't  
13          be, in a place, and they're not getting their services.

14                   In any event, I understood your relief, because  
15          I'm very interested in this, to be we want them to - - - to  
16          provide the services that they have already determined she  
17          should receive and that they agree that she should receive.  
18          Am I misunderstanding what you were arguing?

19                   MR. STOCKWELL: No, that's - - - that's - - -  
20          that's correct. It's our position the state has an  
21          affirmative duty - - - once they've agreed to participate  
22          in a Medicaid program, they - - - they - - - the - - - the  
23          obligations fall upon the state to ensure that those  
24          services are provided. So that - - - that is the - - - is  
25          the argument. They - - - they had to ensure that the



1 services are provided. You know, the question of whether  
2 it's the not-for-profit sector that must, you know, provide  
3 those services versus the state is - - - is a question - -  
4 -

5 JUDGE RIVERA: So then if I can just follow  
6 through on this, so then if I'm understanding your  
7 argument, your argument isn't, you must do it exactly the  
8 way we say you must do it. You must provide those  
9 services. You're the state. You've got the discretion - -  
10 - or the commissioners. You figure out how to do it, but  
11 you can't hold her for five weeks in an ER without  
12 providing those services. Am I understanding you?

13 MR. STOCKWELL: That - - - that - - - that's  
14 correct. But I - - - I - - - I would also add that the - -  
15 - it was our position that the courts below could have  
16 granted injunctive relief, where - - - where the state  
17 failed to do what it was supposed to do to provide those  
18 services that the - - -

19 JUDGE RIVERA: But - - - but that's what I'm  
20 saying. Your - - - your demand has always been, provide  
21 the services that - - - that have already been identified  
22 by the Commissioner that she should be receiving?

23 MR. STOCKWELL: Yeah. These are existing  
24 services. It's - - -

25 JUDGE RIVERA: It's not that you were arguing



1 that, yes, this is - - - I just want to clarify this point.  
2 You - - - you did not go to court to say, they have  
3 determined the wrong sets of services - - -

4 MR. STOCKWELL: Right.

5 JUDGE RIVERA: - - - to provide to her.

6 MR. STOCKWELL: No. There's no - - -

7 JUDGE RIVERA: Correct?

8 MR. STOCKWELL: There's no - - - if that were the  
9 case, if there's a service denial, an application that's  
10 denied - - -

11 JUDGE RIVERA: Yes.

12 MR. STOCKWELL: - - - then the fair hearing  
13 process would kick in. That's not the case.

14 JUDGE RIVERA: Right. Right.

15 MR. STOCKWELL: These are - - -

16 JUDGE RIVERA: Yes. No, I understood your  
17 briefing. This was not about a fair hearing. It was  
18 something else that you were seeking to do. And your - - -  
19 your issue is it just takes them too long to do that. And  
20 in the interim, right, you were claiming that she suffered  
21 as a consequence, because she wasn't receiving the services  
22 that everyone agrees she's entitled to?

23 MR. STOCKWELL: That's precisely right.

24 JUDGE RIVERA: Okay.

25 MR. STOCKWELL: And - - - and I would also add,



1 finally, just getting back to the fundamental alteration  
2 defense, that it wasn't affirmatively pled as a defense at  
3 the - - - at the - - - at the Supreme Court level. It was  
4 interposed at the appellate level. And clearly,  
5 fundamental alteration, with respect to the ADA claims, is  
6 an affirmative defense recognized by, basically, all the  
7 courts that have dealt with it, including the Department of  
8 Justice. And - - - and under the circumstances, it - - -  
9 it should not have - - -

10 JUDGE RIVERA: Well, Counsel - - - again, I'm on  
11 the screen. What - - - you're - - - you're saying there's  
12 no factual dispute or - - - I'm sorry. You are saying  
13 there's something factual to be developed in a record on  
14 that defense?

15 MR. STOCKWELL: I - - - well, the state needs to  
16 - - - to prove that our request that she be provided with  
17 these services would result in a fundamental alteration to  
18 its program; essentially, that it's a new service. And - -  
19 - and it's not.

20 JUDGE RIVERA: I understand. But since everybody  
21 agrees to what the - - - that was sort of the prior line of  
22 inquiry here. Since - - - since you're saying there's no  
23 dispute about what the services are, why - - - why couldn't  
24 they have made this argument, and why couldn't the  
25 Appellate Division have resolved it? Again, I'm not sure



1 I'm understanding what's the discovery, if everybody's  
2 agreeing to what the - - - the services are.

3 MR. STOCKWELL: I don't - - - well, the state's  
4 never agreed that they have an obligation to ensure that  
5 the services must be provided to her, initially. And I - -  
6 - I think that if they're asserting that this is a new  
7 service, essentially, that requiring this - - - the state,  
8 if the - - - if there is no mechanism for - - - for the  
9 private sector to provide these services, that you're  
10 essentially requiring the state to do so as a provider of  
11 last resort; would be, essentially, a new service. That -  
12 - - that's the defense that they would have needed to  
13 prove.

14 JUDGE RIVERA: But you did not argue that the  
15 state had to provide this. That wasn't your argument.

16 MR. STOCKWELL: It was - - -

17 JUDGE RIVERA: Am I correct?

18 MR. STOCKWELL: It's all - - - it's always been  
19 our position that the state should - - - should have  
20 arranged for the services to be provided. But the - - -  
21 the - - - the question is in a - - - in these, you know,  
22 fast-moving fact patterns where the private sector is - - -  
23 is unwilling or unable to provide the service - - -  
24 services. Should the state be required to reallocate some  
25 resources in order to enable the Medicaid recipient to





1 receive those - - - those services? That's - - - that's -  
2 - - that's a question that would needed have - - - to have  
3 been fleshed out through fact-finding at the Supreme Court  
4 level.

5 CHIEF JUDGE DIFIORE: Thank you, Counsel.

6 MR. STOCKWELL: Thank you.

7 CHIEF JUDGE DIFIORE: Counsel?

8 MS. ETLINGER: Good afternoon, Your Honors. May  
9 it please the court, Laura Etlinger for the state  
10 respondents. The Appellate - - -

11 JUDGE TROUTMAN: With respect to the motion to  
12 dismiss, was there a formal motion to dismiss here?

13 MS. ETLINGER: No. This was brought, primarily,  
14 as a summary proceeding, pursuant to Article 70 of the CPLR  
15 and Article - - -

16 JUDGE TROUTMAN: But when you say "primarily," it  
17 is not entirely a summary - - - a summary proceeding?

18 MS. ETLINGER: They included federal statutory  
19 causes of action. But I think the way it was really  
20 litigated in Supreme Court was as a summary proceeding,  
21 seeking to resolve the situation that was at hand. And  
22 that was, really, everybody's focus.

23 And in response to your earlier question, I would  
24 just note at record page 147, which is the transcript, the  
25 - - - I'm not sure if this is what Your Honor was getting



1 at. The Supreme Court offered to keep the proceeding open.

2 JUDGE TROUTMAN: The court did. The court wanted  
3 to make sure this particular child was taken care of. And  
4 then the parties respond - - - the petitioner said, no.

5 MS. ETLINGER: Yes.

6 JUDGE TROUTMAN: If there's a problem, I'll bring  
7 another action.

8 MS. ETLINGER: Yes, exactly.

9 The question before the court is whether any of  
10 these three statutory provisions provide a basis for relief  
11 in this case. And the answer at the - - -

12 JUDGE RIVERA: Counsel, if I can interrupt you.  
13 I'm on the screen. Hello. Good afternoon.

14 MS. ETLINGER: Yes.

15 JUDGE RIVERA: So I - - - I just wanted to make  
16 clear. Are - - - do you agree that, as - - - as opposing  
17 counsel asserted in response to me, that there is no  
18 challenge to what the services themselves are that the - -  
19 - or the Commissioner has decided they're not challenging  
20 that. They just say, okay, so provide those services. And  
21 their - - - their whole - - - what they have gone into  
22 court to seek is for you to do it because it just took too  
23 long.

24 Do - - - do you agree that there's not a dispute  
25 over the services themselves? Forget about how they're



1 provided but that the services themselves.

2 MS. ETLINGER: I - - - I - - - I agree to a large  
3 extent. I think that the - - - they were - - - the - - - a  
4 basis for their claim was that petitioner had been approved  
5 for particular home and community-based services, waiver  
6 services. They were approved. Fund - - - additional hours  
7 were approved for them. Care coordination was provided to  
8 assist the family in locating appropriate providers. There  
9 happened to be particular circumstances in this case that  
10 made it difficult.

11 We don't know what happened with the providers  
12 that were previously serving this petitioner in her home.  
13 But for whatever particular circumstances in this case,  
14 partly in the fact that they lived in the North Country and  
15 there just are fewer providers of all services in a more  
16 sparsely populated region, nobody who was specially trained  
17 for this particular petitioner's service needs was  
18 immediately available.

19 But I want to make it clear - - - two things.  
20 One, OPWDD - - - this is not a case where OPWDD did nothing  
21 in response to the situation. First of all, OPWDD does  
22 have programs in place that seek to address this particular  
23 type of problem on the front end, by seeking to avoid, very  
24 prudently, crisis placements in the first place. And we -  
25 - -



1 JUDGE CANNATARO: Counsel, can I ask you - - -  
2 because I think, in correspondence with the court, you  
3 indicated that there were additional crisis intervention  
4 resources being made available so that this sort of thing  
5 wouldn't happen again. Where do we stand with those  
6 additional services? Are they - - -

7 MS. ETLINGER: They are - - -

8 JUDGE CANNATARO: Go ahead.

9 MS. ETLINGER: I - - - I'm sorry. They are  
10 actually, now, fully available throughout the entire state,  
11 including Region 2. There was some delay in getting the  
12 services available in that region. And they, as we  
13 outlined in our brief, are highly successful.

14 JUDGE CANNATARO: Do you have any statistical  
15 information about the rates of hospitalization or long-term  
16 hospitalization having gone down?

17 MS. ETLINGER: Exactly. And those statistics of  
18 the - - - the most recent ones are available online from  
19 the 2021 fiscal year. And the - - - the same successful  
20 rates continued to occur.

21 JUDGE RIVERA: How - - - how, if at all, Counsel,  
22 might the pandemic make it a little bit uncertain that  
23 those statistics can really be based on the services? Is  
24 there some disaggregation that might be helpful?

25 MS. ETLINGER: I'm not aware of any further



1 statistical analysis that - - - that has been made with  
2 respect to those. What I can say about the pandemic is  
3 that the - - - the challenge facing the system right now  
4 is, as it is in - - - in many, many fields, a shortage of -  
5 - - of staffing.

6 And the state has recognized that that is a  
7 serious concern for the entire service system now, and has,  
8 through federal funding, designated 1.5 billion dollars to  
9 work toward retention and recruitment for direct-care  
10 service workers for people who work with developmentally  
11 disabled children. So this is not a situation where the  
12 state is ignoring the problems at - - - at - - - at hand.

13 JUDGE WILSON: Counsel, I appreciate that. But  
14 the question here, I think, is a - - - is whether these  
15 variously pleaded counts in the complaint state claims or  
16 don't state claims. And everything you said, I think,  
17 would - - - if true, would entitle you to win. But it's  
18 facts that aren't in our record. And if there is any of  
19 these that is a viable claim, just stated as a claim, isn't  
20 the right thing to do to send you back to put that evidence  
21 in record?

22 MS. ETLINGER: Well, I - - - I have two  
23 responses. First, because this was litigated primarily as  
24 a summary proceeding, the Supreme Court did decide the  
25 claims on the merits and rejected them on the merits. And



1 we believe the Appellate Division in the way it - - - it  
2 analyzed it. And our - - - I think the - - - the request -  
3 - -

4 JUDGE TROUTMAN: But what about the fact that it  
5 appears that the AD asserted an affirmative defense that  
6 you did not plead?

7 MS. ETLINGER: I think it was simply clear from  
8 the record. And this goes back to what relief petitioners  
9 were really seeking in this case. Although they - - - they  
10 were making an argument that the approved services weren't  
11 being - - - weren't available to her because there was no  
12 appropriate provider suitable for her at that moment, they  
13 were also clearly indicating again and again, in their memo  
14 of law at page 91 of the record and in their briefing, that  
15 the state had an obligation to operate facilities directly  
16 or provide services directly if there was a situation where  
17 the - - -

18 JUDGE TROUTMAN: So my question is, did you  
19 assert the affirmative defense that the AD - - -

20 MS. ETLINGER: I - - - I - - - we didn't assert  
21 it as specifically as an objection in point of law as an  
22 affirmative defense. In our answer - - -

23 JUDGE TROUTMAN: But are you saying that  
24 nevertheless, that - - -

25 MS. ETLINGER: But it was - - -



1 JUDGE TROUTMAN: - - - it was okay?

2 MS. ETLINGER: It was raised before Supreme Court  
3 in the briefing, in the sense that all the parties agreed  
4 that what petitioner was seeking was an alteration to the  
5 system, so that if there was ever a situation where  
6 services weren't immediately available, the state would  
7 step in and provide those services to fill any gap in the  
8 private sector. And that is a fundamental alteration.

9 JUDGE GARCIA: Counsel, could you address the  
10 private right of action and the effect of Armstrong?

11 MS. ETLINGER: Yes, absolutely. I think what  
12 Armstrong makes clear is not only that the Gonzaga  
13 direction that there must be an unambiguously implied right  
14 of action is the correct test and that the court should not  
15 be focusing primarily, as many of the circuits did in this  
16 case, on the Blessing factors, including whether there is  
17 an intended beneficiary, that that's the wrong focus.

18 Armstrong also made the point very strongly that  
19 in these spending clause statutes, what you have involved  
20 is a contract between the state and the federal government.  
21 And it is the provisions that are telling the federal  
22 government - - - or I'm sorry - - - telling the state what  
23 is required for federal approval and that without clear,  
24 unambiguous language evidencing a congressional intent to  
25 create a cause of action for private litigants, where there



1 are other enforcement mechanisms, as there are here, not  
2 only the federal administrative enforcement but for - - -  
3 not for this particular claim in particular, but for other  
4 types of reasonable promptness claims, there is an  
5 administrative remedy.

6 And I think, for all those reasons, the Appellate  
7 Division was correct that there is no private right of  
8 action. On that point, I would just - - -

9 JUDGE CANNATARO: But Counsel, with respect to  
10 that spending provision argument or spending bill argument  
11 that you make, you know, in - - - in the words of Justice,  
12 then-udge, Alito twenty years ago in the Sabree case, it's  
13 - - - it's not unreasonable to predict that that's what the  
14 Supreme Court's going to do.

15 But they haven't actually done that. They  
16 haven't said where it's a spending bill, it's essentially  
17 contractual and there is no private right of action. Is  
18 there a holding out there that confirms what you're now  
19 putting forth?

20 MS. ETLINGER: Well, I think there is - - - that  
21 is a majority of the lang - - - of the analysis in the  
22 Armstrong case, both in the majority opinion, which notes  
23 that this is a situation where the federal government is  
24 approving what the state is doing, and in the plurality  
25 opinion in that decision.





1                   And I would just point out, too, that the  
 2                   Appellate Division is not the sole outlier on this  
 3                   determination. In the Seventh Circuit, where the circuit  
 4                   itself has assumed, for purposes of deciding and rejecting  
 5                   claims under the reasonable promptness provision, district  
 6                   courts in that circuit have now agreed with the analysis of  
 7                   the Appellate Division and held that there is no private  
 8                   right of action.

9                   But the court need not wade into that issue if it  
 10                  chooses not to. It can affirm dismissal of the Medicaid  
 11                  Act on the merits. The regulation that implements the  
 12                  reasonable promptness provision makes very clear that what  
 13                  is at issue in that provision is delay caused by the  
 14                  agency's administration of the Medicaid program. And that  
 15                  is not what the claim is here.

16                 There is no - - - nothing in the actual  
 17                 administration of the approved waiver program that caused  
 18                 any delay here. The delay was caused because providers  
 19                 weren't available. And there's no - - - there's nothing in  
 20                 the - - - in the Medicaid Act or the Medicaid waiver here  
 21                 that guaranteed that in every situation that could possibly  
 22                 arise, which are unfortunate situations - - - certainly,  
 23                 OPWDD is very concerned when any situation like this  
 24                 arises. And they do what they did in this case. They jump  
 25                 into action, make concerted efforts to try and locate any



1 interim relief that might be available.

2 But sometimes, you know, the - - - the system  
3 isn't perfect. But there is a comprehensive system in  
4 place. To the extent it involves Medicaid, it was approved  
5 by the federal government. And for those - - -

6 JUDGE RIVERA: But Counsel, if I can interrupt  
7 you there, I'm not going to disagree with what you said, in  
8 part. But the standard is reasonableness, right? And  
9 what, five weeks may not appear reasonable, whereas maybe  
10 five days would, right?

11 MS. ETLINGER: But the - - -

12 JUDGE RIVERA: So it - - - it's about the extent  
13 of the delay.

14 MS. ETLINGER: Well, I don't - - -

15 JUDGE RIVERA: You - - - you may be making best  
16 effort - - - no, I'm not going to challenge any question  
17 about best efforts. Judge Wilson's already pointed out  
18 that some of this, of course, would have - - - would have  
19 been decided on the merits because you haven't really  
20 developed the record. But it is five weeks. It's a  
21 reasonableness standard. And that may - - - that is  
22 exactly what courts do. They figure out whether or not  
23 something is reasonable, under the circumstances.

24 MS. ETLINGER: But the reasonable - - - the - - -  
25 what I would disagree with is that the reasonable



1 promptness provision requires that services be provided for  
2 any conceivable circumstance that might cause delay but  
3 that the state is responsible for that - - - for that delay  
4 under the statutory provision.

5 The - - - the statute, as made clear by the  
6 implemented - - - implementing regulation, is talking about  
7 how the system is administered, how the existing approved  
8 system is admin - - - is implemented.

9 JUDGE RIVERA: Yes, but it - - - in this case, a  
10 system that relies on entities that are not available  
11 really pushes the button. I - - - I don't think this is  
12 your strongest argument, let me just say. And you can  
13 continue to make it, but it - - - it's a very odd argument  
14 to make that, you know, we threw up our - - - you did a lot  
15 of work, but look, it's just the region, and the  
16 circumstances here just made this go on and on for five  
17 weeks.

18 MS. ETLINGER: I would just point out that these  
19 are all very unique circumstances. And what - - -

20 JUDGE RIVERA: Well, you've got - - - again, that  
21 - - - that is a very fact-laden assertion, and I don't  
22 think you can make that, at this stage.

23 MS. ETLINGER: Well - - -

24 JUDGE RIVERA: I mean, you've got the hospital  
25 saying you've still got problems.



1 MS. ETLINGER: Well, this was not brought as a  
2 class action, I would just remind the court.

3 JUDGE RIVERA: Well, I understand that.

4 MS. ETLINGER: But the - - - the cases involving  
5 the reasonable promptness provision make clear that what  
6 they're really talking about is things like requiring too  
7 much of a reserve so that funding is not actually available  
8 for the services that have been approved or things like  
9 having a waiting list in a waiver program, even though  
10 there are unfilled waiver slots. That involves  
11 administration of the program.

12 What we're talking about here is how is the  
13 program, in the entire system in the state, devised in the  
14 first place. And - - -

15 JUDGE RIVERA: Yeah, but obviously, since you've  
16 - - - since you've, in your briefing and today, asserted  
17 that there are these other ways of addressing the issues,  
18 you yourselves - - - I mean, internally, the state has  
19 recognized that there was a problem, what they came up  
20 with.

21 MS. ETLINGER: No, I - - - I - - -

22 JUDGE RIVERA: I mean, I don't think you - - - I  
23 don't think you can walk back from that. It might still  
24 not violate the provision, but I don't think you can walk  
25 away from that.



1 MS. ETLINGER: I - - - I think the state has  
2 certainly taken steps to address a need. And it's always  
3 trying to be flexible to address whatever the need is that  
4 arises. That's why, right now, they're addressing the  
5 shortage in staffing.

6 But the - - - the implication of petitioner's  
7 claims is, really, that this would not have occurred and  
8 could be solved in the future if the state operated a  
9 program that had empty beds, ready and waiting for any  
10 particular crisis situation, each of which is very unique,  
11 might arise, or that there are state staff readily  
12 available to go on a moment's notice to anywhere in the  
13 state to provide direct, at-home services if, in that  
14 particular situation, suitable providers are not  
15 immediately available.

16 And we would submit that's not a reasonable  
17 solution to this problem because for the very reason that  
18 each individual will have particular and specialized  
19 service needs, in particular, in cases like this, where you  
20 have an individual with not only developmental disabilities  
21 but also mental health and behavioral conditions that make  
22 it a complex service need.

23 And you - - - if you had - - - even if the state  
24 had a dedicated respite facility for children, which, you  
25 know, whether this is, you know, fiscally feasible, we're



1 not even addressing here. But if it did, and it had, you  
2 know, five empty beds that it just kept and staff waiting  
3 for a crisis situation to occur, that couldn't guarantee  
4 that a particular individual who needed a placement, that  
5 that would be an appropriate placement for that individual.

6 They may have particular service needs that have  
7 - - - need certain staff-to-client ratios that might not be  
8 set up in that facility. They may have particular service  
9 needs for specially trained staff that might not be in that  
10 facility. So I - - - I think the idea that there is some  
11 perfect system out there that the state has failed to  
12 create that would avoid every crisis situation simply isn't  
13 realistic.

14 CHIEF JUDGE DIFIORE: Thank you, Counsel.

15 MS. ETLINGER: Thank you.

16 CHIEF JUDGE DIFIORE: Counsel, your rebuttal.

17 MR. STOCKWELL: Thank you, Your Honor. I'll be  
18 brief. It was never our position that the state needed to  
19 create buildings and - - - and staff them and - - - and be  
20 ready at a moment's notice to save children in - - - in  
21 crisis. That's nowhere in our pleadings, and I take issue  
22 with that.

23 We - - - we sought declaratory and injunctive  
24 relief below that we - - - we stated several causes of  
25 action under the Mental Hygiene Law, the Medicaid Act, and



1 Americans with Disabilities Act. And we were seeking  
2 preliminary and injunctive relief but not - - - not  
3 building buildings by the state.

4 I wanted to touch on a couple of things, you  
5 know, that the state touched on. The fact that they didn't  
6 do noth - - - didn't do nothing, in the context of this  
7 case, what they did was they provided referrals to nonexist  
8 - - - nonexistent services and offered to pay for those  
9 nonexistent services. So that's essentially nothing, as  
10 far as I'm concerned.

11 And they have an obligation under - - - pursuant  
12 to the 2010 amendment to the Medicaid Act, medical  
13 assistance means paying for services but also the services  
14 themselves. Clearly, they have an obligation under the  
15 Medicaid Act to - - -

16 JUDGE CANNATARO: So what is the remedy? Do you  
17 - - - do you concede that the only solution to that issue  
18 is for the state to step in and provide those services  
19 themselves?

20 MR. STOCKWELL: No, I wouldn't concede that. I  
21 think that we need fact-finding in - - - in the case to  
22 determine the - - - the - - - the extent of the state's  
23 resources but also the extent - - - extent of the resources  
24 in the private sector and the ability of the state to  
25 reallocate those resources and incentivize the private

1 sector to provide services to individuals - - -

2 JUDGE GARCIA: I'm sorry. What would that be?  
3 You would get some kind of declaratory relief to reallocate  
4 resources?

5 MR. STOCKWELL: No, that - - - well, we are  
6 seeking injunctive relief, but potent - - -

7 JUDGE GARCIA: So what would happen there?

8 MR. STOCKWELL: The state - - - I think that in  
9 cases where the Department of Justice has been involved,  
10 they have found violations similar to these. And they said  
11 to the states, look, you have all this money, billions of  
12 dollars to the Med - - - Medicaid program. You need to  
13 move some of that stuff around and potentially incentivize  
14 the private sector. If that's your - - - your program - -  
15 -

16 JUDGE GARCIA: But that's the Department of  
17 Justice enforcing a federal statute in terms of spending,  
18 but we're going to have a - - - a trial judge in - - - in  
19 this part of New York State make that determination? Is  
20 that what would happen?

21 MR. STOCKWELL: It's - - - it's - - - Your Honor,  
22 I - - - I - - - that would probably be the extreme end of -  
23 - - end of things, but - - -

24 JUDGE GARCIA: But it's - - - that's what you're  
25 asking for?





1 MR. STOCKWELL: I - - - I - - -

2 JUDGE GARCIA: What would be the nonextreme end?

3 MR. STOCKWELL: I - - - I - - - realistically,  
4 we'd have to see how the fact-finding played out because I  
5 don't know what the facts are in this case.

6 JUDGE GARCIA: But doesn't that type of remedy  
7 and potential really go to whether or not this claim should  
8 go forward at all? Because if there's the potential for  
9 you to have a - - - a Supreme Court judge or a - - - a  
10 trial judge in this case reallocating state resources under  
11 Medicaid, would it be some kind of statewide plan?

12 MR. STOCKWELL: I think that - - - I - - - I'm  
13 not certain of the type of relief that Supreme Court would  
14 come up with. That would be, like I said, more of an  
15 extreme option. It's - - - it's difficult to envision what  
16 the injunctive relief would - - - would look like under the  
17 circumstances. The injunctive relief could look as - - -  
18 as simple as State of New York, you have obligations under  
19 the Medicaid plan. Clearly, there's a violation here. You  
20 need to fix the problem. We - - - you know, prepare a plan  
21 for - - - for us or for - - - for - - -

22 JUDGE WILSON: Or - - - or you might get a  
23 declaration and no injunction at all. Is that possible? I  
24 mean, you sought declaratory relief as well.

25 MR. STOCKWELL: Yeah. Well, it's absolute - - -



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I think we have to have the declaratory findings first,  
before we get to injunctive relief.

JUDGE WILSON: But the court may, just for  
reasons related to injunctive relief, not relating to the  
merits, may decline to give you injunctive relief.

MR. STOCKWELL: That could certain - - -  
certainly be the case, yeah. They're - - - they're  
severable. That - - - that is correct, Your Honor.

CHIEF JUDGE DIFIORE: Thank you, Counsel.

MR. STOCKWELL: Thank you.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Cheryl Odom, certify that the foregoing transcript of proceedings in the Court of Appeals of MHLS v. Delaney, No. 28 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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