DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202	
Plaintiff(s): COLORADO CROSS-DISABILITY COALITION, A COLORADO CORPORATION, and CARRIE ANN LUCAS, v. Defendant(s): JOAN HENNEBERRY, Executive Director of the Department of Health Care Policy and Financing, Individually and in her Official Capacity, and COLORADO DEPARTMENT OF HEALTH CARE POLICY AND FINANCING.	▲ **COURT USE ONLY** ▲
JOHN W. SUTHERS, Attorney General JOAN E. SMITH, Assistant Attorney General* JENNIFER WEAVER, Assistant Attorney General* 1525 Sherman Street, 5th Floor Denver, CO 80203 (303) 866-5660 Registration Number: 34605 *Counsel of Record	Case No.: 2009cv11661 Courtroom 6
RESPONSE TO MOTION FOR TEMPORARY RESTRAINING ORDER AND FOR PRELIMINARY INJUNCTION	

The Department of Health Care Policy and Financing ("HCPF"), and Joan Henneberry, in her official capacity, through their counsel, the Office of the Attorney General, and pursuant to C.R.C.P. 42(b), hereby respectfully move this Court to DENY Plaintiff's motion.

In order to prevail on a temporary restraining order or preliminary injunction, the Plaintiffs must prove all the prerequisites for preliminary injunctive relief. See *Rathke v. MacFarlane*, 648 P2d 648, 653 (Colo.1982). Those prerequisites are enumerated separately, below:

1. Plaintiffs have no reasonable probability of success on the merits

Regulations governing administration of the Medicaid Program set forth a protocol that the recipient must follow in order to request and obtain in home support services (IHSS) benefits. Reimbursement for IHSS shall occur only upon approval of

the IHSS Care Plan and after the PAR has been submitted and approval received by the single entry point case manager. 10 C.C.R. 2505-10, § 8.552.7.A. If a recipient is dissatisfied with the level of benefits authorized in accordance with the care plan, the recipient has a right to appeal the determination to the Office of Administrative Courts. 10 C.C.R. 2505-10, § 8.057.

In this case, Plaintiff Lucas failed to contact her case manager until she was nearly ready for discharge. At that time, both the discharge planner and Department program staff had attempted to locate an in-home, acute care services provider for Plaintiff Lucas by contacting home health agencies and private duty nursing services. For a post-hospital, acute care episode, care would normally be furnished by either of these types of providers. Although the Department identified providers who could furnish in-home, acute care services, these providers only scheduled "intermittent" care in two hour shifts throughout the day/night. Plaintiff Lucas insisted that she required care for the duration of the overnight period and rejected the care that was available.

Plaintiff Lucas demanded an immediate allocation increase (necessitated by her failure to notify county staff in advance so that the caseworker could develop a task work sheet to base the increase on) of $8,370 per month, in addition to the $7,762.38 she was already receiving, when her caseworker had been given no opportunity to verify the tasks needed so that and program staff could justify the increase in Plaintiff Lucas's budget. In an effort to meet Plaintiff Lucas's demands, the Department program staff and county program coordinator determined an appropriate rationale for increasing Plaintiff Lucas's allocation (based on customary post-acute home care practices and regulations - *See* 10 CCR 2505-10 § 8.520.2.D) and the county issued notice to Plaintiff Lucas advising her of the increase in her allocation from $7,762.38 to a total of $12,252.14 and sent a PAR request to the Department for which the Department had already authorized approval.

In view of the fact that the Department and the county have, in fact, authorized an increase under unreasonable demands and pressures from the recipient in an attempt to meet her needs within the bounds of program laws and regulations, Plaintiff Lucas's allegation that the "Department has refused to approve payment for the increase in Plaintiff Lucas's CDASS allocation or any other service to stay in her home" is incorrect and Plaintiff Lucas is unlikely to prevail at a hearing on the merits.

2. There is no danger of real, immediate and irreparable injury which may be prevented by injunctive relief

The first 'injury' Plaintiff Lucas has alleged - "attendant caregivers ***may*** not be paid" - is speculative. Plaintiffs have not definitively stated that the caregivers will not be paid. In fact, the Department ***has*** authorized an increase in Petitioner's CDASS allocation. The dispute over the amount of the allocation increase should be

resolved through the appeals process authorized by the Medicaid regulations. Recipient appeals are regularly afforded a relatively prompt audience before an ALJ. In this case, the county issued a notice to Plaintiff Lucas that her benefits were increased on 12/28/09 (effective retroactively to 12/11/09.) Plaintiff Lucas therefore has standing to file her appeal at the Office of Administrative Courts.

The Department has already approved 16 hours of skilled care per day, the maximum amount allowed under Colorado law. *See* 10 CCR 2505-10 § 8.520.2.D. "Adult recipients may be approved for up to 16 hours of PDN [private duty nursing care] per day. Any additional hours of skilled care scheduled by Petitioner in excess of this amount is prohibited and thus the caregivers are not entitled to payment. As a result, there is no danger of irreparable injury.

The other 'injury' alleged, that "Lucas will be unable to pay for [overnight] services and will have to seek services from a long term care facility" is not irreparable. Plaintiff has stated that this acute period of illness is temporary and that her condition will improve, possibly within 60 days, at which time she may no longer need a level of care that exceeds the services available to her in the community where she has chosen to reside. Given that Plaintiff Lucas has been receiving care at home since her discharge from the hospital on December 11, 2009, it seems unlikely that her caregivers would not have become accustomed to the monitoring and maintenance tasks associated with her tracheostomy and ventilator and that she will require admission to a long term care facility. However, even if it were necessary for Plaintiff Lucas to be admitted to a facility, that would only be a temporary circumstance until her acute episode has improved.

3. There is a plain, speedy and adequate remedy at law.

Under state Medicaid program regulations, Plaintiff Lucas, a Medicaid recipient, may file an administrative appeal at the Office of Administrative Courts contesting the sufficiency of the Department's determination to increase her monthly allocation to $12, 252.14. "Equity will not intervene where the plaintiff has a plain and adequate remedy at law." *American Investors Life Ins. Co. v. Green Shield Plan, Inc.*, 358 P2d 473, 476 (ColoApp1961.) No restraining order or injunction is appropriate where Plaintiff Lucas may have her complaint heard by an Administrative Law Judge.

4. The granting of a preliminary injunction will disserve the public interest

The public interest is not the same as the "disabled community" public interest. The public interest here includes the public interest of all Medicaid recipients and all the taxpayers that fund the Medicaid program. See C.R.S. § 25.5-4-102. The taxpayers have an interest in limiting Medicaid spending to reasonable and necessary costs for qualified recipients. The budget is not unlimited. Dollars spent for care of one recipient are not available to pay for care for another needy person.

In order to insure that Medicaid funds are allocated and spent appropriately, the Department must obtain some objective criteria upon which to base an authorization for services. Recipients are not allowed to dictate to the Department what benefits or benefit levels they receive. The Department is required under the law to treat all applicants uniformly and fairly. In order to do so, the Department has established methods for assessing needs that are applied to all similarly situated applicants.

For CDASS recipients, the Department requires the county caseworker and recipient to work together to determine the tasks for which the recipient needs and is eligible to receive assistance and the Department bases its allocation of funds on those objective criteria. If a recipient disagrees with the results of the assessment, a speedy and adequate administrative appeal process is available. 10 C.C.R. 2505-10, § 8.057.3.A.

5. The balance of equities does not favor the injunction

The public's interest in the proper use and allocation of Medicaid funds is not outweighed by one recipient's demand for special treatment.

6. That the injunction will preserve the status quo pending a trial on the merits.

By her Motion, Plaintiff Lucas actually seeks a mandatory injunction to pay increased benefits and does not in any way seek to preserve the status quo. The status quo is that Plaintiff has a current CDASS allocation of $7,762.38. She is not seeking to preserve that, but to further enlarge, on an immediate basis, the increase that the Department has determined it may authorize under the circumstances. Plaintiff Lucas is attempting, through the device of an injunction, to circumvent normal process for benefits determinations and obtain benefits without any objective proof to support her demand for an allocation of $17,338.38.

Furthermore, the status quo in Plaintiff Lucas's case includes the fact that there are no private duty nursing agencies or home health agencies willing to furnish overnight services at Plaintiff's residence. The Department holds the program open to qualified provider applicants statewide. The Department is not to blame if, in a given area, for example, a rural area with low population density like Windsor, Colorado, there is no individual or entity willing or able to furnish overnight services. 10 C.C.R. 2505-10, § 8.390.1.

WHEREFORE, for the reasons and authorities set forth herein, the Department respectfully requests that the Plaintiffs' motion be DENIED.

Respectfully submitted this 5th day of January, 2010.

JOHN W. SUTHERS
Attorney General

Original Signature on File

/s/Joan E. Smith
JOAN E. SMITH, 34605*
Assistant Attorney General
State Services Section
Attorneys for COLORADO DEPARTMENT OF HEALTH CARE POLICY AND FINANCING
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **RESPONSE TO MOTION FOR TEMPORARY RESTRAINING ORDER AND FOR PRELIMINARY INJUNCTION** upon all parties herein by LexisNexis File & Serve, and/or by U.S. Mail this 5th day of January, 2010, addressed as follows:

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Facsimile: 303.839.1782
Counsel for Plaintiff

Original Signature on File

/s/Pam Ponder
Original Signature on File with the Attorney General's Office