

<p>DISTRICT COURT, DENVER COUNTY  STATE OF COLORADO  Court Address: 1437 Bannock Street  Denver, CO 80202</p> <hr/> <p>Plaintiff(s):  COLORADO CROSS-DISABILITY COALITION, a  Colorado Corporation, and  CARRIE ANN LUCAS,</p> <p>v.</p> <p>Defendant(s):  JOAN HENNEBERRY, Executive Director of the  Department of Health Care Policy and Financing, in her  Official Capacity, and  COLORADO DEPARTMENT OF HEALTH CARE  POLICY AND FINANCING.</p> <hr/> <p>Attorney or Party Without Attorney:  Kevin W. Williams  Colorado Cross-Disability Coalition  655 Broadway, Suite 775  Denver, CO 80203  Phone Number: 303.839.1775  Fax Number: 303.839.1782  E-mail: kwilliams@ccdconline.org  Atty. Reg. #: 28117</p>	<p><b>FILED Document</b>  <b>CO Denver County District Court 2nd JD</b>  <b>Filing Date: Dec 18 2009 4:35PM MST</b>  <b>Filing ID: 28595692</b>  <b>Review Clerk: Stacey Johnson</b></p> <p>▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number:</p> <p>Div.: Ctrm.:</p>
<p><b>COMPLAINT</b></p>	

**INTRODUCTION**

1. Plaintiffs, Carrie Ann Lucas and Colorado Cross-Disability Coalition (“CCDC”), by and through her attorney, Kevin W. Williams, Legal Program Director of the Colorado Cross-Disability Coalition, brings this Complaint against the Department of Health Care Policy and Financing (“Department”) and its director, Joan Henneberry, for violations of the Americans with Disabilities Act (“ADA”), 42 U.S.C. §12101, *et seq.* and various provisions of the Medicaid Act, 42 U.S.C. § 1396.

2. Despite Plaintiff Lucas’ multiple successes as an attorney and the fact that she is

the adoptive parent of three children with disabilities and foster parent of another disabled child, Ms. Lucas has multiple disabilities herself. Ms. Lucas is eligible for and receives Medicaid-funded home health care services. Attendants provide health care-related, personal care and homemaker services to Ms. Lucas because of her disabilities in her home.

3. Colorado Cross-Disability Coalition (“CCDC”), Colorado’s only statewide disability rights advocacy organization, has devoted a great deal of time and resources to ensure Ms. Lucas gets the services she needs at home rather than in an institution. Ms. Lucas is a CCDC member.

4. As a result of a neuromuscular disease, on December 3, 2009, Ms. Lucas had surgery at Rose Medical Center (“RMC”) for a tracheotomy to facilitate mechanical ventilation. The surgery was successful, and it came time for Ms. Lucas to be discharged from the hospital.

5. At the time of her recent discharge from the hospital, the Department was aware that she would need acute care home health care services, a trained person or persons to assist with and monitor the new tracheotomy and ventilator equipment overnight for two or more months in Ms. Lucas’ home. Despite the Department’s agreement and obligation to pay for these services, the Department has delayed and/or refused to pay for such needed services. At the time of the filing of this lawsuit, the Department still has not authorized payment for services Plaintiff Lucas is using right now.

6. These actions subject Plaintiff Lucas and the disabled children who live with her to imminent probable risk of institutionalization, a violation of the ADA. The Department’s actions also violate the Medicaid Act because the Department is not paying for needed home health care services for Plaintiff Lucas since her return home. Plaintiff Lucas has two choices: (1) Continue to schedule attendants to work for her overnight and risk that the Department will not authorize payment for them, making Ms. Lucas responsible for thousands of dollars of bills; or (2) go into the one long term care skilled nursing facility in Colorado that will accept ventilator-dependent individuals with disabilities, a facility located in Pueblo, Colorado, far more than one hundred seventy miles from Ms. Lucas’ home and family in Windsor, Colorado.

7. The ADA was enacted to prevent the unnecessary isolation, segregation and institutionalization of individuals with disabilities. The Department’s inaction with respect to Ms. Lucas’ need for payment of in-home attendant services will lead to her being institutionalized outside of her home and far away from her family.

8. Almost twenty years after the enactment of the ADA, the Department still causes individuals with disabilities to be segregated in institutions by refusing to authorize and pay for in-home services.

9. The cost to the state of Colorado for institutionalization is far greater than the cost of paying for in-home attendant services.

10. Plaintiffs Lucas and CCDC seek a court order compelling the Department to authorize payment for Ms. Lucas' services immediately, monetary damages and reasonable attorneys' fees and costs.

### **JURISDICTION AND VENUE**

11. This court has jurisdiction over this action pursuant to article 6, section 9 of the Colorado Constitution.

12. This action is brought pursuant to the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, 42 U.S.C. § 1983, and various federal statutes. This Court has concurrent jurisdiction with the United States District Court of Colorado over such claims.

13. Declaratory and ancillary relief is authorized pursuant to C.R.S. § 13-51-106 and Rule 57 of the Colorado Rules of Civil Procedure.

14. Injunctive relief is authorized pursuant to Rule 65 of the Colorado Rules of Civil Procedure.

15. Venue is proper within this District pursuant to Rule 98 of the Colorado Rules of Civil Procedure.

### **PARTIES**

16. Plaintiff Colorado Cross-Disability Coalition ("CCDC") is a Colorado non-profit corporation whose members are persons with disabilities and their non-disabled allies.

17. Plaintiff Carrie Ann Lucas is substantially limited in numerous major life activities and is an individual with a disability within the meaning of the ADA. Plaintiff Lucas currently resides in Windsor, Colorado. Plaintiff Lucas is eligible for and receives medical assistance under the Medicaid program run by Defendant Department. Plaintiff Lucas is a member of CCDC.

18. Defendant Joan Henneberry is Executive Director of the Department, the single state agency designated to administer the Colorado Medical Assistance Program under Title XIX of the Social Security Act and Colorado statutes. As such, she is responsible for general administration and supervision of the Colorado Medicaid Program.

19. Defendant Department is the single state agency designated to administer the Colorado Medical Assistance Program under Title XIX of the Social Security Act and Colorado

statutes. Part of the Department's duties under these statutes include authorizing payment for and paying for appropriate home health care and long term care services for individuals who are eligible to receive Medicaid-funded long term care when such services are medically necessary. Defendant Department is located in Denver, Colorado.

### ALLEGATIONS

20. Plaintiff Lucas is substantially limited in several major life activities, including her ability to walk, hear, breathe, and see. As a result of Plaintiff Lucas's disabilities, on December 3, 2009, she was admitted to Rose Medical Center ("RMC") for the purpose of having a tracheotomy to assist her with her substantial respiratory difficulties. This surgery was a planned procedure.

21. Ms. Lucas has been eligible for long term care services in Colorado for many years under the Colorado Medical Assistance Program or Medicaid. Ms. Lucas is eligible for nursing facility level of care services; however, Ms. Lucas is capable of living in her own home.

22. Immediately after Plaintiff Lucas' surgery and until December 11, 2009, she remained at RMC in the intensive care unit as an inpatient.

23. Immediately after Plaintiff Lucas' surgery, Plaintiff Lucas, Julie Reiskin ("Director Reiskin") who is CCDC's Executive Director and Plaintiff Lucas's advocate, the undersigned counsel, who is Plaintiff Lucas's medical power of attorney ("MPOA"), all contacted case workers at the hospital and employees of the Department to address Plaintiff Lucas' discharge plan from RMC.

24. Plaintiff Lucas resides in her own home in Windsor, Colorado with her three children and one foster child, all of whom also have significant disabilities and are recipients of Colorado Medicaid-funded services.

25. Plaintiff Lucas is an attorney who practices law for Plaintiff CCDC. She has resided in her own home and done so using long term care services funded by the Department for many years.

26. Plaintiff Lucas has been and remains capable of residing in her home if appropriate long term care services are provided and funded.

27. Plaintiff Lucas' long term care services are provided through the Colorado Consumer Directed Attendant Support System ("CDASS") program. *See* Colo. Rev. Stat. § 25.5-6-1101 *et seq.* This program *inter alia* enables Plaintiff Lucas to hire, train, supervise and manage her home care attendants without the need for intervention of a home health care agency.

Plaintiff Lucas has participated in this CDASS program since its inception in 2003. Plaintiff Lucas has successfully managed attendant care for herself and for her children with disabilities in her home without need for institutionalization during this time.

28. After Plaintiff Lucas's surgery on December 3, 2009 at RMC, it was medically necessary for Ms. Lucas to receive in-home overnight attendant care services paid for by the Department to assist with management of her new breathing equipment. One means for the Department to accomplish this is to authorize payment for private duty nursing or other home health care services.

29. The social worker at RMC informed Plaintiff Lucas that she believed that there would not be private duty nursing available for Plaintiff Lucas in order for her to be discharged from the hospital.

30. Plaintiff Lucas contacted CCDC Director Reiskin who immediately contacted the Department to inform them that there were no set services available and requested that the Department pay for private duty nursing as an adjunct service to Plaintiff Lucas's existing CDASS services. The Department agreed to do so; however, the Department and the RMC social worker determined that no agency and/or private duty nursing services were available to serve Plaintiff Lucas.

31. On December 10, 2009, because the social worker had not found a home health agency that could serve Ms. Lucas in her home, RMC contacted several long term care facilities to assess Ms. Lucas for transfer. A staff person from Select Specialty Hospital, a long term acute care facility, informed Plaintiff Lucas that they were ready to accept Ms. Lucas for transfer immediately. This facility is located in Denver, more than fifty-five miles from Ms. Lucas' home in Windsor, Colorado.

32. Plaintiff Lucas informed Select Speciality Hospital's staff person that she would only go to their long term care facility "over [Ms. Lucas'] dead body," and asked the staff member to leave her hospital room.

33. That same day, Barbara Prehmus, director of Colorado Medicaid Long Term Care, responded to Director Reiskin's request for approval of additional long term care services for Plaintiff Lucas and said that Plaintiff Lucas's CDASS allocation could be increased to pay for additional attendants to work in Plaintiff Lucas' home to cover the services determined to be unavailable by a home health care agency in Plaintiff Lucas' area.

34. At this time, there was no medically necessary reason for Plaintiff Lucas to remain at RMC.

35. Plaintiff Lucas made clear to RMC social workers and physicians that she intended to return home and not to a long term care facility and that she would not enter into a long term care facility.

36. Plaintiff Lucas, her MPOA and Director Reiskin all had regular and repeated communications with the Department concerning how to provide services in Plaintiff Lucas' home and that such services would be less expensive for the Department than continuing Plaintiff Lucas' hospitalization for providing services in a long term care facility.

37. In fact, the Department could provide payment for services in Ms. Lucas' home at a lower cost than keeping Ms. Lucas in RMC or sending her to a long term care facility.

38. The Department agreed to increase Plaintiff Lucas's CDASS allocation to enable Plaintiff Lucas to find the attendant care necessary to provide extensive in-home acute care treatment.

39. Based on the Department's promise to pay to increase Plaintiff Lucas's CDASS allocation, Plaintiff Lucas made arrangements to have attendants provide such services, including overnight assistance with her new breathing equipment and protective oversight in case her ventilator failed after discharge from the hospital.

40. On December 11, 2009, Plaintiff Lucas hired overnight attendants so that she could return home and met with social workers to explain the discharge plan. Plaintiff Lucas was discharged from RMC on this day and returned home.

41. Since December 11, 2009 Plaintiff Lucas has resided in her home using attendant care services, including overnight services, and intends to continue doing so.

42. Plaintiff Lucas does not need to be institutionalized in a long term care facility. She has all of the services in place that she needs to remain in her home.

43. The Department has refused to approve payment for the increase in Plaintiff Lucas's CDASS allocation or any other service to enable her to stay in her home.

44. Without such approval, Plaintiff Lucas is at imminent risk of losing the services that she needs to remain at home.

45. If Plaintiff Lucas cannot get authorization from the Department to pay for the services she is receiving in her home, she and her disabled children are at imminent risk for institutionalization outside of their home to receive such services.

46. On December 17, 2009, Plaintiff Lucas' case manager with Weld County Area Agency on Aging, Maria De La Fuente, e-mailed Plaintiff Lucas, Director Reiskin and Department officials and informed them of the following: Ms. De La Fuente needed to "build a task worksheet in order to examine current care vs. new acute care."

47. Weld County Area Agency on Aging is the single entry point agency charged with coordinating Plaintiff Lucas' long term care services.

48. Ms. De La Fuente informed those to whom she sent the email that she would not be able to complete this assessment and allocation adjustment until after January 4, 2010.

49. At the time of the filing of this Complaint, Plaintiff Lucas does not know if the Department will approve a CDASS allocation increase, if or by what method the attendants working for her now in her home will be paid. These attendants and the hours they are working are essential for Ms. Lucas to remain in her home.

50. Case worker De La Fuente instructed Plaintiff Lucas to continue submitting hours for her attendants to be paid to the state's contracted fiscal intermediary service for the CDASS program even though the Department has not authorized payment for these services.

51. Plaintiff Lucas's attendants cannot continue working for her in her home without assurance of payment for the services.

52. Plaintiff Lucas cannot afford to pay her attendants herself for the services the Department is required to pay for.

53. If Plaintiff Lucas' attendants stop working for her, Plaintiff Lucas will have no choice but to find a long term care facility for herself and her disabled children. Her two minor children would likely be placed in foster homes, and her eldest, nineteen-year-old, daughter would likely have to enter a long term care facility. Her foster child was facing nursing home placement before being placed with Plaintiff Lucas, and a nursing home could continue to be her only placement option.

54. If Plaintiff Lucas must pay her attendants for services, she will have to enter a long term care facility to receive such services.

55. Plaintiff Lucas has suffered irreparable harm as a result of the Department's inaction.

56. Plaintiff Lucas and her disabled children are at serious and immediate risk of institutionalization and being forced to live in an isolated, segregated setting that is much more

restrictive than their home and not appropriate to the needs of their individual disabilities.

57. CCDC's purpose is to work for systemic change that promotes independence, self-reliance, and full inclusion for people with disabilities in the entire community. As part of that purpose, CCDC seeks to ensure that persons with disabilities have access to -- and do not encounter discrimination in -- publicly funded services like the Medicaid Program

58. CCDC's mission includes striving to ensure that no individual with a disability is isolated and segregated into an institution when appropriate services are available and can be funded to enable such individuals to live in their own homes.

59. CCDC engages in extensive outreach as well as advocacy and educational efforts to promote access for and combat discrimination such as unlawful segregation against people with disabilities. This effort and this purpose have been and continue to be adversely affected by Defendant's violations of the ADA.

60. Defendant's actions have caused and continue to cause distinct, palpable, and perceptible injury to CCDC.

61. CCDC has devoted resources, which could have been devoted to its other outreach, advocacy, and educational efforts, to combating Defendant's discriminatory policies.

62. CCDC has devoted resources, which could have been devoted to its other outreach, advocacy, and educational efforts, to counseling members and others who have been injured by Defendant's discrimination.

63. Defendant's discrimination has been and continues to be a barrier to the full participation of persons with disabilities and, therefore, frustrates CCDC's ability to achieve full inclusion for persons with disabilities.

64. Defendant's discrimination has required and continues to require CCDC to make a greater effort -- and to allocate significant resources -- to educate the public that such discrimination is wrong and otherwise to counteract the adverse impact of such discrimination. This perceptibly impairs CCDC's counseling, advocacy, educational, and training missions.

65. CCDC also has devoted and continues to devote resources -- including but not limited to those devoted to the present lawsuit -- to identifying and counteracting the sources of discrimination in the community, including that of Defendant.

66. CCDC's injuries -- including, without limitation, those described herein -- are traceable to defendants' discriminatory conduct alleged in this Complaint and will be redressed



by the relief requested in it.

67. CCDC's members and their spouses, friends, relatives, and associates have been injured and will continue to be injured by Defendant's discrimination.

68. The elimination of discrimination, such as that of Defendant, and the integration of persons with disabilities into all aspects of community life are at the core of CCDC's organizational purpose.

69. The participation of individual CCDC members in the lawsuit is not required either to resolve the claims at issue or to formulate relief.

70. Defendants acted intentionally or with reckless disregard or callous indifference to the federally protected rights of plaintiffs.

71. CCDC has been damaged by Defendant's discriminatory practices as set forth in this Complaint.

72. Plaintiffs have been and will continue to be damaged by the Department's actions and will suffer irreparable harm if the Department's conduct does not change.

#### **FIRST CLAIM FOR RELIEF**

(Violations of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.*)

73. Plaintiffs incorporate by reference all other allegations of this Complaint as if set forth in full herein.

74. The ADA was enacted to prevent the unnecessary isolation and segregation of individuals with disabilities. 42 U.S.C. § 12101(2).

75. The ADA was enacted to prevent the discriminatory practice of the institutionalization of individuals with disabilities. 42 U.S.C. § 12102(3).

76. The ADA was enacted to ensure the full participation of and independent living for individuals with disabilities. 42 U.S.C. § 12101(7).

77. One of the primary purposes of the ADA is to insure that individuals with disabilities receive services in the most integrated setting appropriate to the needs of the individual with the disability. 28 C.F.R. § 35.130(d).

78. Under Title II of the ADA, 42 U.S.C. § 12131 *et seq.*, it is unlawful

discrimination for the Department to require Plaintiff Lucas to obtain necessary attendant care services outside of her home. *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 583 (1999):

The ADA both requires all public entities to refrain from discrimination, and specifically identifies unjustified “segregation” of persons with disabilities as a “for[m] of discrimination,” see §§ 12101(a)(2), 12101(a)(5). The identification of unjustified segregation as discrimination reflects two evident judgments: Institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life and institutional confinement severely diminishes individuals’ everyday life activities (internal citations omitted).

79. In the absence of the relief requested herein, the Department’s actions will lead to the unnecessary institutionalization of Plaintiff Lucas and her disabled children.

80. Institutionalization of Plaintiff Lucas and her disabled children will cost the Department significantly more money than will authorization of payment for services Plaintiff Lucas is already receiving and will continue receiving in her home.

81. All that is needed for Plaintiff Lucas and her disabled children to remain in their home is for the Department to authorize an increase in Plaintiff Lucas’s CDASS allocation to enable Ms. Lucas to compensate her attendants for the additional services being provided.

82. The medical professionals who comprise Plaintiff Lucas’s treatment team all agree that it is appropriate for Plaintiff Lucas to continue receiving attendant care services in her home, and the Department is aware of this treatment team decision.

83. Plaintiffs Lucas and CCDC have been damaged and will continue to be damaged by Defendant’s actions as described herein.

### **SECOND CLAIM FOR RELIEF**

(Violations of 43 U.S.C. § 1983 and the Medicaid Act, 42 U.S.C. § 1396 *et seq.*)

84. Plaintiffs incorporate by reference all other allegations in this Complaint as if set forth in full herein.

85. 42 U.S.C. § 1983 creates a civil cause of action for deprivation of rights guaranteed by federal statutes and regulations.

86. In this case, Defendant Department violated several aspects of the Medicaid Act, 42 U.S.C. § 1396 *et seq.* as set forth in this Complaint.

87. Medicaid is a medical assistance program for the indigent, supported jointly by federal and state funds. 42 U.S.C. § 1396 *et seq.* States are not required to participate in the Medicaid program, but if a state chooses to participate, it must comply with the requirements of the federal Medicaid Act and its implementing regulations. State medicaid programs are implemented according to comprehensive written plans for medical assistance. 42 U.S.C. § 1396. State plans must be submitted to the Secretary of U.S. Department of Health and Human Services (“HHS”) for approval, to ensure compliance with federal law.

88. The federal Medicaid program requires a state to establish or designate a single State agency that is responsible for administering or supervising the administration of the State’s Medicaid program. 42 U.S.C. § 1396a (a)(5). Colorado has chosen to participate in the Medicaid program, and it accepts federal matching funds for its program expenditures. Colo. Rev. Stat. § 26-4-105. Colorado has designated the Department as the single State agency that is responsible for administering and supervising the administration of Colorado’s Medicaid program.

89. The Department is required to ensure home health services as defined in 42 C.F.R. § 431.70(a) are provided to eligible Medicaid recipients. 42 C.F.R. § 440.70(b).

90. Plaintiff Lucas is eligible to receive Department-funded home health services.

91. Eligible Medicaid clients are entitled to receive Department-funded nursing service as needed upon release from a hospital if such services are required. 42 U.S.C. § 440.70(b)(1).

92. Plaintiff Lucas is qualified to receive Department-funded home health care services.

93. Eligible Medicaid clients are entitled to receive Department-funded private duty nursing services as needed. 42 U.S.C. § 440.80.

94. Plaintiff Lucas is qualified to receive Department-funded private duty nursing services.

95. The Department is required to authorize payment for “Other services requested by the agency [or hospital] and approved by CMS as cost effective and necessary to avoid institutionalization.” 42 U.S.C. § 440.180(b)(89). CMS means the Centers for Medicare and Medicaid Services, the federal government agency that administers the Medicaid program. CMS has approved the CDASS program as a cost effective and necessary service in Colorado for eligible Medicaid clients.

96. Plaintiff Lucas is qualified to receive Department-funded CDASS services.

97. Although the Department is required to ensure that mandatory services like home health care and nursing services be available on a statewide basis, 42 C.F.R. § 431.50, home health and nursing services for Plaintiff Lucas were not available in Windsor, Colorado, the location where she resides, upon her discharge from the hospital.

98. Defendant Department was required to ensure Plaintiff Lucas and the Department funded one of the services listed above upon Ms. Lucas' discharge and failed to do so.

99. Nothing in federal or state law requires Ms. Lucas' caseworker to conduct the type of assessment she claims to need to conduct before payment for services is authorized.

100. Nothing prevents the Department from immediately authorizing payment for the additional CDASS hours Ms. Lucas needs to live at home.

101. Without the relief requested herein, Plaintiff Lucas will be unable to afford payment for the attendant care services she needs to remain in her home, which the Department is required to pay for.

102. The Department may also authorize an increase in CDASS allocation for Plaintiff Lucas to receive home health care services in her home and has done so in similar situations for other CDASS clients.

103. As of this time, the Department has failed to authorize funds for Plaintiff Lucas's increased CDASS allocation necessary for Plaintiff Lucas to continue receiving services in her home.

104. Without the relief requested herein, it is unclear, if, under what circumstances, or when the Department will authorize payment for the services Plaintiff Lucas requires to remain in her home.

105. Plaintiffs Lucas and CCDC have been damaged by and will continue to be damaged by Defendant's actions and/or inaction in the absence of the relief requested herein.

106. Plaintiffs will suffer and are suffering immediate, irreparable harm as a proximate cause of the Department's actions and/or inactions.

107. Plaintiffs' damages are a direct and proximate cause of Defendant Department's actions and/or inactions.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request this Court:

1. Declare the Department's actions to be in violation of the ADA and the Medicaid Act.
2. Order the Department to authorize payment for Plaintiff Lucas's CDASS allocation as follows: Ms. Lucas needs the Department to authorize payment of \$8,370.00 per month for two months and a re-assessment of her ongoing allocation prior to the expiration of that time.
3. Award Plaintiffs damages, interest, costs and expert witness fees, as provided by law.
4. Award Plaintiffs reasonable attorneys' fees and costs pursuant to 42 U.S.C. §§ 1983 & 12205.
5. Grant such other and further relief as may be just and proper.

**JURY DEMAND:** Plaintiffs demand a jury on all issues which can be heard by a jury.

Dated: December 18, 2009

Respectfully submitted,

COLORADO CROSS-DISABILITY COALITION  
LEGAL PROGRAM

*/s/ Kevin W. Williams*

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