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IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS

DONNA RADASZEWSKI, Guardian, on behalf)
of Eric Radaszewski,)
)
Plaintiff,)
)
vs.)
)
JACKIE GARNER, Director of Illinois Department)
of Public Aid,)
)
Defendant.)

No. 00 CH 1475
Judge Mehling

01 DEC 19 AM 9:31
CLERK OF THE CIRCUIT
JUDGE MEHLING

DEFENDANT'S ANSWER TO PLAINTIFF'S
SUPPLEMENTAL COMPLAINT FOR INJUNCTIVE RELIEF

Defendant JACKIE GARNER, Director of the Illinois Department of Public Aid, submits this Answer to Plaintiff's Supplemental Complaint for Injunctive Relief.

FIRST DEFENSE

Counts I, II, III and IV of Plaintiff's Supplemental Complaint for Injunctive Relief are moot.

SECOND DEFENSE

Count VI of Plaintiff's Supplemental Complaint for Injunctive Relief is barred by the Eleventh Amendment to the United States Constitution.

THIRD DEFENSE

Plaintiff cannot bring Count VI of her Supplemental Complaint for Injunctive Relief against the Director of the Illinois Department of Public Aid.

FOURTH DEFENSE

Defendant answers the numbered paragraphs of Plaintiff's Supplemental Complaint for Injunctive Relief as follows:

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EXHIBIT
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COUNT I: VIOLATION OF ILLINOIS ADMINISTRATIVE PROCEDURE ACT
5 ILCS 100/1 et seq.

1. Plaintiff Donna Radaszewski is the guardian for her disabled son, Eric Radaszewski. She brings this action in her capacity as Eric's guardian on his behalf.

ANSWER: Defendant admits the allegations contained in ¶1.

2. Plaintiff and Eric reside in Du Page County, Illinois.

ANSWER: Defendant admits the allegations contained in ¶2.

3. Defendant Ann Patla is the Director of the Illinois Department of Public Aid (IDPA).

ANSWER: Defendant admits that Ann Patla was IDPA's Director at the time this case was initially brought and avers that Jackie Garner is IDPA's current Director.

4. IDPA is the state agency charged with the administration of the Medicaid program in Illinois.

ANSWER: Defendant admits the allegations contained in ¶4.

5. Eric, born August 5, 1973, is 21 years old.

ANSWER: Defendant deny that Eric was born on August 5, 1973 and that he is presently 21 years old. Defendants aver that Eric was born on August 5, 1979 and is currently 22 years old.

6. Eric is disabled and receives disability benefits under the federal Supplemental Security Income program. He is eligible for Medicaid.

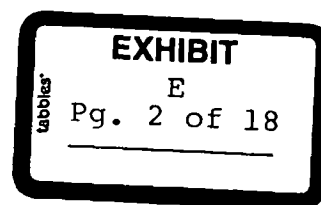
ANSWER: Defendant admits the allegations contained in ¶6.

7. On February 12, 1992, Eric was diagnosed with medulloblastoma, a brain cancer.

ANSWER: Defendant admits the allegations contained in ¶7.

8. On December 24, 1993, Eric suffered a mid-brain stroke after he had undergone surgery, radiation and chemotherapy as treatment for the cancer.

ANSWER: Defendant admits the allegations contained in ¶8.



9. The disease, stroke and the subsequent treatment have left Eric with a very low level of body and mental functioning. He is highly medically fragile.

ANSWER: Defendant admits the allegations contained in ¶9.

10. It is the opinion of Eric's physician that Eric requires private duty nursing services of a registered nurse, one-on-one, 24 hours per day in order to survive.

ANSWER: Defendant admits that Eric's physician recommends that he receive 24 hours per day of registered nursing care, but is without sufficient knowledge to form a belief as to the correctness of this recommendation.

11. For the past five years, Eric received private duty nursing care at home by registered nurses 16 hours per day, with 336 additional hours per year of services from registered nurses to provide Eric's parents respite. The balance of his 24 hour per day care came from his parents, who were specially trained to provide the necessary services to avoid medical crisis for Eric.

ANSWER: Defendant admits that, from 1995 to 2000, Eric received 16 hours per day of private duty nursing care at home by registered nurses, with 336 additional hours per year of respite care. Defendant is without sufficient knowledge to admit or deny that the balance of Eric's care was provided by his parents or that they were specially trained.

12. This care was paid for by Medicaid.

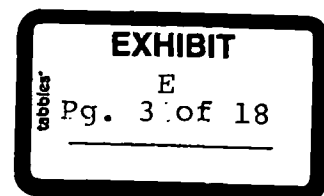
ANSWER: Defendant admits the care described in ¶11, other than any provided by Eric's parents, was paid for by Medicaid.

13. The Medicaid program is a joint federal and state funded program enacted to provide necessary medical assistance to needy disabled persons and families with dependent children, whose income and resources are insufficient to meet the cost of care. 42 U.S.C. §1396, 305 ILCS 5/5-1.

ANSWER: Defendant admits the allegations contained in ¶13.

14. Each State participating in the Medicaid program must submit a Medicaid plan to the Secretary of Health and Human Services (HHS) for approval. 42 U.S.C. §1396.

ANSWER: Defendant admits the allegations contained in ¶14.



15. The plan must specify the amount, duration, and scope of each service that the state provides in its Medicaid program. 42 U.S.C. §1396a(a)(10), 42 U.S.C. §1396d(a), 42 CFR §440.230(a).

ANSWER: Defendant admits the allegations contained in ¶15.

16. Private duty nursing is a service that states may choose to include in their Medicaid plans. 42 U.S.C. §1396d(a)(8), 42 U.S.C. §1396a(a)(10)(C), 42 CFR §§440.225, 440.80.

ANSWER: Defendant admits the allegations contained in ¶16.

17. Federal regulations define "private duty nursing" as nursing services provided to persons who require more individual and continuous care than is available from a visiting nurse or than is routinely provided by the nursing staff of a hospital or nursing facility. 42 CFR §440.80. Under the regulation, the state has the option to provide private duty nursing services in the recipient's home, at a hospital or at a skilled nursing facility. 42 CFR §440.80(c)

ANSWER: Defendant admits the allegations contained in ¶17.

18. In addition to providing the Medicaid coverage described in their Medicaid plans, States have the option of requesting approval from HHS to provide home and community based care services for persons who would otherwise require institutional care that would be paid for by Medicaid. These services are provided under a range of Medicaid waiver programs that are authorized under 42 U.S.C. §§1396a(a)(10)(A)(ii)(VI), 1396n(b)-(e). Under this waiver authority, the Secretary of HHS may grant waivers of certain otherwise applicable Medicaid requirements, including for example financial eligibility requirements and service limitations. *Id.*

ANSWER: Defendant admits the allegations contained in ¶18.

19. Illinois has submitted to HHS and obtained federal approval of its Medicaid plan.

ANSWER: Defendant admits the allegations contained in ¶19.

20. The Illinois Medicaid plan includes broad coverage for private duty nursing, with the sole conditions that the private duty nursing is recommended by a physician, that prior approval from the state agency is sought, and that the nursing care not be provided by a relative. The plan includes no limitations as to cost or as to where these services must be provided. The sections of the Illinois Medicaid Plan relating to private duty nursing services, Exhibit A, are attached to and made a part of this Complaint.

ANSWER: Defendants admits that the sections of Illinois' prior Medicaid Plan relating to private duty nursing services are attached to Plaintiff's initial Complaint for Injunctive Relief. Defendant denies each and every other allegation contained in ¶20. Defendant avers that a

Medicaid Plan amendment, deleting all references to private duty nursing services, was approved by HHS on February 2, 2001, with a retroactive effective date of January 1, 2001.

21. Illinois has also expanded its Medicaid program by including several home and community based care Medicaid waiver programs approved by the Secretary of HHS.

ANSWER: Defendant admits the allegations contained in ¶21.

22. Under the Home Services waiver program ("HSP"), Illinois provides services that are not otherwise covered under the Medicaid program, including personal care and homemaker services, to enable disabled adults to remain in their home. The cost of services which may be provided to recipients under this waiver program is limited, however, to the average Medicaid cost of care for persons in skilled nursing facilities.

ANSWER: Defendant admits the allegations contained in ¶22.

23. There is no ¶23 in Plaintiff's Complaint for Injunctive Relief.

24. Despite the language of the Illinois Medicaid plan covering private duty nursing with only the limitations described in paragraph 20, above, it is Defendant's unwritten policy to impose additional restrictions that eliminate private duty nursing for persons aged 21 or older and instead provide such services only through the HSP, its limited and community based Medicaid waiver program.

ANSWER: Defendant denies each and every allegation contained in ¶24.

25. As Eric's 21st birthday approached, state officials advised Eric's mother to contact the Office of Rehabilitation Services ("ORS") to apply for the HSP as the sole avenue to obtain continued private duty nursing services for Eric.

ANSWER: Defendant admits that state officials contacted Plaintiff regarding transitioning Eric to the HSP program, but avers that such contact first occurred in 1997, after Eric became 18.

26. On February 18, 2000, ORS issued a decision limiting Eric's eligibility for HSP services to a "service cost maximum" of \$4,593 per month.

ANSWER: Defendant admits the allegations contained in ¶26.

27. This service cost maximum amount reduced funding for Eric's private duty nursing services to the equivalent of five hours per day.

ANSWER: Defendant is without sufficient knowledge to admit or deny the allegations contained in ¶27.

28. Plaintiff filed an administrative appeal on the ORS decision limiting Eric's services under the HSP to \$4,593 per month, and an administrative hearing was held on July 25, 2000.

ANSWER: Defendant admits the allegations contained in ¶28.

29. At this hearing, Eric's treating physician, Janina Badowska, M.D. testified that in her medical opinion, Eric requires 24 hour one-on-one skilled nursing care from registered nurses and that the level of care offered by the ORS service cost maximum would leave Eric at great medical risk. She further testified that Eric's needs could not be met by staffing levels at a skilled nursing facility.

ANSWER: Defendant admits that Eric's treating physician testified that Eric needs substantial one on one nursing care and urged that he be provided the funds to support 24 hours per day of skilled nursing care. Defendant admits that Dr. Badowska testified that placing Eric in a nursing home would seriously medically compromise him. Defendant is without sufficient information to to admit or deny the remaining allegations contained in ¶29.

30. On August 18, 2000, Defendant Ann Patla, as Director of IDPA, issued an administrative decision, affirming the ORS decision limiting funding of Eric's services under the Home Services Program to \$4,593 per month, despite a finding of fact in the decision that placing Eric in a nursing facility would place Eric at risk of danger.

ANSWER: Defendant admits that, on August 18, 2000, Defendant issued an IDPA final administrative decision affirming the ORS determination to limit funding of Eric's HSP services to \$4,593 per month. Defendant admits that the Hearing Officer presiding over the underlying administrative proceeding made a factual finding that Eric's parents submitted uncontradicted evidence that Eric would be at risk of danger if he should be placed in a nursing home.

31. Under the Illinois Administrative Procedure Act, 5 ILCS 100/1-70, each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy is a "rule" within the meaning of the Act.

ANSWER: Defendant avers that this statute speaks for itself and that Plaintiff has

omitted material portions thereof.

32. Defendant's unwritten policy limiting Medicaid coverage for private duty nursing services for adults to the services provided under the HSP waiver program is a rule of general applicability within the meaning of 5 ILCS 100/1-70.

ANSWER: Defendant denies each and every allegation contained in ¶32.

33. Under 5 ILCS 100/5-40, state agencies must adopt rules pursuant to the notice and comment rulemaking procedure specified in the provision.

ANSWER: Defendant avers that this statute speaks for itself and that Plaintiff has omitted material portions of this particular statutory provision and other provisions of the Administrative Procedure Act.

34. Because Defendant has not followed the notice and comment rule-making procedure set out in 5 ILCS 100/5-40 for the unwritten policy limiting Medicaid coverage for private duty nursing services for adults to the services provided under the HSP waiver program, the policy is invalid under the Illinois Administrative Procedure Act.

ANSWER: Defendant denies each and every allegation contained in ¶34. Furthermore, Defendant avers that, effective September 1, 2001, IDPA amended 89 Illinois Administrative Code §§140.435 and 140.436 to strike all text relating to Medicaid coverage of private duty nursing services, thereby clarifying that payment is made for this service only for children under 21 years of age who are covered under a program waiver or are identified as needing this service through a screening under the Early and Periodic Screening, Diagnosis and Treatment ("EPSDT") Program.

35. Eric will suffer irreparable injury if Defendant is not enjoined from applying this invalid rule to deny Eric the full amount and scope of private duty nursing services described in the Illinois Medicaid plan.

ANSWER: Defendant denies each and every allegation contained in ¶35.

36. Eric has no adequate remedy at law.

ANSWER: Defendant denies each and every allegation contained in ¶36.

37. Eric is indigent and unable to post bond.

ANSWER: Defendant is without sufficient knowledge to admit or deny the allegations contained in ¶37.

COUNT II: VIOLATION OF THE MEDICAID PLAN

1-30. Plaintiff re-alleges paragraphs one through thirty of Count I as paragraphs one through thirty of Count II.

ANSWER: Defendant adopts her answers to ¶¶1-30 of Count I as her answers to ¶¶1-30 of Count II of Plaintiff's Supplemental Complaint for Injunctive Relief.

31. The Illinois Public aid Code directs IDPA to establish standards and rules to determine the amount and nature of medical services to be included in the Medicaid program, including private duty nursing services. 305 ILCS 5/5-4, 5-5.

ANSWER: Defendant avers that 305 ILCS 5/5-4 and 5-5 speak for themselves.

32. The Illinois Medicaid plan sets out such standards and rules.

ANSWER: Defendant denies each and every allegation contained in ¶32.

33. Defendant has violated the Illinois Medicaid plan by failing to provide Eric the full amount, duration and scope of private duty nursing services set out in the Illinois Medicaid plan.

ANSWER: Defendant denies each and every allegation contained in ¶33.

34. Eric will suffer irreparable injury if Defendant is not enjoined from failing to afford Eric the full amount and scope of private duty nursing services described in the Illinois Medicaid plan.

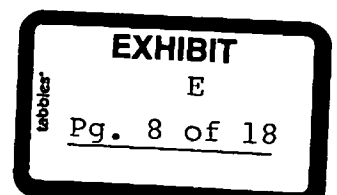
ANSWER: Defendant denies each and every allegation contained in ¶34.

35. Eric has no adequate remedy at law.

ANSWER: Defendant denies each and every allegation contained in ¶35.

36. Eric is indigent and unable to post bond.

ANSWER: Defendant is without sufficient information to admit or deny the allegations contained in ¶36.



COUNT III: VIOLATION OF 89 ILL.ADM CODE §140.435

1-30. Plaintiff re-alleges paragraphs one through thirty of Count I as paragraphs one through thirty of Count III.

ANSWER: Defendant adopts her answers to ¶¶1-30 of Count I as her answers to ¶¶1-30 of Count III of Plaintiff's Supplemental Complaint for Injunctive Relief.

31. The Illinois Public Aid Code directs IDPA to establish standards and rules to determine the amount and nature of medical services to be included in the Medicaid program, including private duty nursing services. 305 ILCS 5/5-4, 5-5.

ANSWER: Defendant avers that 305 ILCS 5/5-4 and 5-5 speak for themselves.

32. The Department's rule at 89 Ill. Adm. Code §140.435(B)(2) provides that Medicaid payment "shall be made" for private duty nursing services.

ANSWER: Defendant denies that 89 Ill. Adm. Code §140.435(b)(2) currently provides that payment "shall be made" for private duty nursing services. Defendant avers that, effective September 1, 2001, IDPA amended 89 Illinois Administrative Code §140.435 to strike all text relating to payment for private duty nursing services.

33. Defendant's refusal to cover medically necessary private duty nursing services for Eric violates 89 Ill. Adm. Code §140.435(b)(2).

ANSWER: Defendant denies each and every allegation contained in ¶33.

34. Eric has no adequate remedy at law.

ANSWER: Defendant denies each and every allegation contained in ¶34.

35. Eric is indigent and unable to post bond.

ANSWER: Defendant is without sufficient information to admit or deny the allegations contained in ¶35

COUNT IV: BREACH OF CONTRACT

1-30. Plaintiff re-alleges paragraphs one through thirty of Count I as paragraphs one through thirty of Count IV.

ANSWER: Defendant adopts her answers to ¶¶1-30 of Count I as her answers to ¶¶1-30 of Count IV of Plaintiff's Supplemental Complaint for Injunctive Relief.

31. The Illinois medicaid plan is a contract between the Illinois Department of Public Aid and the federal government.

ANSWER: Defendant denies each and every allegation contained in ¶31.

32. Medicaid recipients, including Eric, are the clearly intended and direct beneficiaries of this contract.

ANSWER: Defendant denies each and every allegation contained in ¶32.

33. By failing to afford Eric the full amount, duration, and scope of private duty nursing included in the Illinois Medicaid Plan, defendant is in breach of contract.

ANSWER: Defendant denies each and every allegation contained in ¶33.

34. Defendant's decision to restrict Eric's nursing services to the cost maximum of the home Services Program, thereby denying him the benefit of the private duty nursing services described in the Illinois Medicaid plan, has injured Eric.

ANSWER: Defendant denies each and every allegation contained in ¶34.

35. Eric has no adequate remedy at law and requires specific performance of the terms of the Medicaid plan in order to obtain relief.

ANSWER: Defendant denies each and every allegation contained in ¶35.

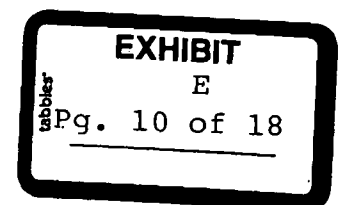
COUNT V: VIOLATION OF THE ILLINOIS ADMINISTRATIVE PROCEDURE ACT

1-24. Plaintiff realleges paragraphs one and two, four, six through eighteen, twenty-one and twenty-two, and twenty-five through thirty of Count I as paragraphs one through twenty-four of Count V.

ANSWER: Defendant adopts her answers to ¶¶1, 2, 4, 6-18, 21, 22 and 25-30 of Count I as her answers to ¶¶1-24 of Count V.

25. In March 2001 Jackie Garner replaced defendant Ann Patla as Director of the Illinois Department of Public Aid and endorses all of the actions taken by Ms. Patla relevant to this lawsuit.

ANSWER: Defendant admits the allegations contained in ¶25.



26. Eric Radaszewski was born on August 5, 1979

ANSWER: Defendant admits the allegations contained in ¶26.

27. In August, 2000, when Eric turned 21 years old, Illinois' Medicaid plan, as submitted to HHS, included coverage for private duty nursing, with the sole conditions that private duty nursing services be recommended by a physician, that prior approval from the State agency be sought, and that the nursing care not be provided by a relative. A copy of that provision as it existed at that time is attached to this Complaint as Exhibit A.

ANSWER: Defendant admits that Illinois' Medicaid Plan included coverage for private duty nursing in August, 2000, but denies that the conditions stated by Plaintiff in ¶27 were the sole conditions on such coverage. Defendant specifically denies that the Medicaid Plan ever provided coverage of private duty nursing for individuals 21 years of age or older. Defendant also denies that a copy of the Plan provision regarding private duty nursing is attached as an exhibit to Plaintiff's Supplemental Complaint for Injunctive Relief.

28. Despite the language of the Illinois State plan covering private duty nursing with the sole limitations described in paragraph 28 [sic], above, it was the unwritten policy of the State to impose additional restrictions that eliminate private duty nursing for persons aged 21 or older and instead provide such services only through the HSP, its limited and community based Medicaid waiver program.

ANSWER: Defendant admits that it was State policy to provide in-home nursing for persons aged 21 or older only through the HSP program, but deny that this policy was unwritten, that this policy violated Illinois' Medicaid Plan and that the Medicaid Plan contained only the coverage limitations described by Plaintiff in ¶27.

29. On September 1, 2000, plaintiff brought an action in the United States District Court for the Northern District of Illinois against Defendant Patla, seeking to enjoin defendant's reduction of Eric's nursing services. Plaintiff claimed that defendant's actions, deviating from its Medicaid plan, violated the federal Medicaid statute, its implementing regulations and the requirements of due process.

ANSWER: Defendant denies that Director Patla's actions deviated from Illinois' Medicaid Plan or violated any legal requirements. Defendant admits the remaining allegations

contained in ¶29.

30. The District Court denied plaintiff's motion for a preliminary injunction, and plaintiff appealed that interlocutory order.

ANSWER: Defendant admits the allegations contained in ¶30.

31. On December 1, 2000, plaintiff filed the present case, bringing claims founded on state law that could not be included in the federal law suit. Plaintiff's claims, set out as counts I-IV, included that defendant's unwritten policy to deny Eric private duty nursing violated the notice and comment requirements of the Illinois Administrative Procedure Act, 5 ILCS 100/1 et seq., the requirements set out in its Medicaid plan, and 89 Ill. Adm. Code 140.435(b), and deprived Eric of his rights as a third party beneficiary of the contract between the department and the federal government.

ANSWER: Defendant denies that Eric was denied private duty nursing pursuant to an unwritten policy, that that denial violated any legal requirements or that Eric was deprived of any contractual rights. Defendant admits the remaining allegations contained in ¶31.

32. On December 19, 2001, this Court entered an Order denying Defendant's Motion to Dismiss and issued a Temporary Restraining Order enjoining Defendant from reducing Eric's nursing services pending further order.

ANSWER: Defendant admits the allegations contained in ¶32.

33. On January 3, 2000, without prior notice to either this Court or to the Seventh Circuit Court of Appeals, the plaintiff or the public, the department submitted to HHS an amendment to the Illinois Medicaid plan, deleting coverage for private duty nursing services for adults. On February 2, 2001, HHS approved the amendment.

ANSWER: Defendant denies that Illinois' Medicaid Plan ever covered private duty nursing services for adults. Defendant avers that the Plan amendment entirely removed private duty nursing from the Plan by deleting all provisions and language regarding this service. Defendant further avers that prior notice was not required in order to obtain HHS approval of this amendment. Defendant admits the remaining allegations contained in ¶33.

34. On March 16, 2001, IDPA published in the Illinois Register a proposed rule to amend 89 Ill. Adm. Code §140.435 and §140.436 to delete Medicaid coverage for private duty nursing services. The "Complete Description of the Subjects and Issues Involved" section of the notice

of rulemaking stated that the changes "are being made as clarifications...."

ANSWER: Defendant admits the allegations contained in ¶34, but avers that Plaintiff's recitation of the content of the "Complete Description of of the Subjects and Issues Involved" section of the notice of rulemaking is incomplete and that material portions have been omitted.

35. On May 23, 2001, pursuant to public request, the Department conducted a hearing on the proposed rules.

ANSWER: Defendant admits the allegations contained in ¶35.

36. On July 23, 2001, the Department submitted to the Joint Committee on Administrative Rules ("JCAR") its Second Notice of Proposed Rulemaking for the proposed amendment.

ANSWER: Defendant admits the allegations contained in ¶36.

37. In the section of the Second Notice describing the public comments objecting to the deletion of Medicaid coverage for private duty nursing services for adults, the Department claimed that "the comments received were not related to the rules, or their intended purpose or potential effect" and that the "proposed amendments do not change the Department's policy on coverage for home health services for adults." Exhibit B, Second Notice of Proposed Rulemaking, page 8.

ANSWER: Defendant denies that IDPA's rules ever provided Medicaid coverage of private duty nursing for adults. Defendant avers that IDPA's rules were amended to clarify that payment was provided for private duty nursing only for children under 21 years of age who are covered under a Medicaid waiver or are identified as needing the service through an EPSDT screening. Defendant admits that, in response to a comment, IDPA stated in the Second Notice that "The proposed amendments do not change the Department's policy on coverage for home health services for adults," but avers that Plaintiff has omitted material portions of IDPA's response. Defendant admits that, in its Second Notice, IDPA generally stated that some of the comments received "are not related to these rules or the intended purpose and potential effect of the proposed amendments," but denies that such a response was made to any particular comment

objecting to a supposed deletion of medicaid coverage of private duty nursing for adults.

38. On August 7, 2001, JCAR reviewed the rules without objection.

ANSWER: Defendant admits the allegations contained in ¶38.

39. On September 1, 2001, the Department filed a certified copy of the amended rules with the office of the Secretary of State.

ANSWER: Defendant admits the allegations contained in ¶39.

40. Under the Illinois Administrative Procedure Act, 5 ILCS 100/1-70 each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy is a rule within the meaning of the Act.

ANSWER: Defendant avers that this statute speaks for itself and that Plaintiff has omitted portions thereof.

41. Under 5 ILCS 100/5-40, state agencies must adopt rules pursuant to the notice and comment rule making procedure specified in the provision. Among these requirements, an agency must include in the first notice of rule making a "complete description of the subjects and issues involved." 5 ILCS 100/5-40(b)(3). During the notice period, the agency must accept from interested persons data, views, arguments or comments and it must "consider all submissions received." 5 ILCS 100/5-40(b).

ANSWER: Defendant avers that this statute speaks for itself and that Plaintiff has omitted portions thereof.

42. In promulgating the amendments to 89 Ill. Adm. Code §140.435 and §140.436, defendant has not followed the letter or the spirit of the requirements set out in 5 ILCS 100/5-40(b). The Department refused to consider the comments of the public on the decision to delete Medicaid coverage for private duty nursing services, having deemed the comments not pertinent to the purpose of the rule making. The Department's Notice of Proposed Rule making did not include a complete description of the subjects and issues involved, failing to disclose that it was implementing a policy to delete Medicaid coverage for private duty nursing services for adults or the reasons for not covering those services.

ANSWER: Defendant denies each and every allegation contained in ¶42.

43. Eric will suffer irreparable injury if Defendant is not enjoined from applying its invalid rules to deny Eric the full amount and scope of private duty nursing services he has been receiving under the former Illinois Medicaid plan.

ANSWER: Defendant denies each and every allegation contained in ¶43.

44. Eric has no adequate remedy at law.

ANSWER: Defendant denies each and every allegation contained in ¶44.

45. Eric is indigent and unable to post bond.

ANSWER: Defendant is without sufficient knowledge to admit or deny the allegations contained in ¶45.

COUNT VI: VIOLATION OF THE AMERICANS WITH
DISABILITIES ACT: 42 USC §12132 and 28 CFR §35.130

1-39. Plaintiff re-alleges paragraphs one through thirty-nine of Count V as paragraphs one through thirty-nine of Count VI.

ANSWER: Defendant adopts her answers to ¶¶1-39 of Count V as her answers to ¶¶1-39 of Count VI.

40. Under the Department's policy, Eric may receive Medicaid payment for necessary long term care services in institutions, meaning skilled nursing facilities and hospitals, but not at home.

ANSWER: Defendant admits that Eric may receive Medicaid payment for necessary long term care services in skilled nursing facilities and hospitals, but denies that Eric may not receive payment for long term care services at home. Defendant avers that IDPA has determined that Eric is eligible to receive \$4,593 per month under its Medicaid Home Services Waiver Program.

41. In-home nursing care is the most integrated setting for services for Eric, and is at least as cost-effective as treatment he would receive in an institution.

ANSWER: Defendant denies each and every allegation contained in ¶41.

42. Under Title II of the Americans with Disabilities Act, 42 USC §12132 and its implementing regulations at 28 CFR ¶35.130, public entities must provide services to persons with disabilities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

ANSWER: Defendant avers that the Americans with Disabilities Act ("ADA") and its

implementing regulations speak for themselves and that Plaintiff has omitted relevant portions thereof.

43. Eric is a qualified individual with a disability within the meaning of Title II of the ADA.

ANSWER: Defendant denies each and every allegation contained in ¶43.

44. The Illinois Department of Public Aid of which defendant Patla is Director is a "public entity" within the meaning of Title II of the ADA.

ANSWER: Defendant denies that Ann Patla is currently Director of the Illinois Department of Public Aid. Defendant admits the remaining allegations contained in ¶44.

45. The Department's failure to provide Eric Medicaid services in his home, the most integrated setting for receipt of those services, violates the community integration requirements of Title II of the Americans with Disabilities Act, 42 USC §12132 and its implementing regulation 28 CFR §35.130.

ANSWER: Defendant denies each and every allegation contained in ¶45.

46. Eric will suffer irreparable injury if Defendant is not enjoined from reducing his Medicaid covered nursing services at home forcing him into an institution where his health will be in imminent danger and he will be segregated from his family and the larger community.

ANSWER: Defendant denies each and every allegation contained in ¶46.

47. Eric has no adequate remedy at law.

ANSWER: Defendant denies each and every allegation contained in ¶47.

48. Eric is indigent and unable to post bond.

ANSWER: Defendant is without sufficient knowledge to admit or deny the allegations contained in ¶48.

**COUNT VII: VIOLATION OF SECTION 504 OF REHABILITATION
ACT OF 1973: 29 USC §794 and 28 CFR 41.51(d)**

1-41. Plaintiff re-alleges paragraphs one through forty-one of Count VI as paragraphs one through forty-one of Count VII.

ANSWER: Defendant adopts her answers to ¶¶1-41 of Count V as her answers to ¶¶1-41 of Count VI.

42. Section 504 of the Rehabilitation Act of 1973 ("Section 504") prohibits discrimination against people with disabilities on the basis of their disabilities in programs and services that receive federal financial assistance. 29 USC §794.

ANSWER: Defendant avers that the Rehabilitation Act speaks for itself and that Plaintiff has omitted relevant portions thereof.

43. Section 504 requires that services must be provided in the most integrated setting appropriate to the needs of individuals with disabilities. 28 CFR §41.51(d).

ANSWER: Defendant avers that the Rehabilitation Act and its implementing regulations speak for themselves and that Plaintiff has omitted relevant portions thereof.

44. The Department's failure to provide Medicaid services for Eric in his home, the most integrated setting for receipt of those services, even though it will provide Medicaid services in institutions for Eric, violates Section 504.

ANSWER: Defendant denies each and every allegation contained in ¶44.

45. Eric will suffer irreparable injury if Defendant is not enjoined from reducing the Medicaid covered nursing services he currently receives at home, forcing him into an institution where his health will be in imminent danger, and he will be segregated from his family and the larger community.

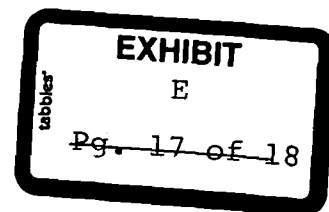
ANSWER: Defendant denies each and every allegation contained in ¶45.

46. Eric has no adequate remedy at law.

ANSWER: Defendant denies each and every allegation contained in ¶46.

47. Eric is indigent and unable to post bond.

ANSWER: Defendant is without sufficient knowledge to admit or deny the allegations contained in ¶47.



Respectfully submitted,

James E. Ryan,
Attorney General of Illinois

By:



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David Adler
Assistant Attorneys General
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