UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

HARRY DAVIS; RITA-MARIE GEARY; PATTY POOLE; and ROBERTA WALLACH, on behalf of themselves and all others similarly situated,

Plaintiffs,

RESPONSE MEMORANDUM OF LAW

-vs-

12-CV-6134 CJS

NIRAV SHAH, individually and in his official capacity as Commissioner of the New York State Department of Health,

Defendant.

INTRODUCTION

Plaintiffs Harry Davis, Rita-Marie Geary, and Patty Poole seek mandatory temporary relief. Specifically, they request that the Court issue a temporary restraining order that would require the defendant, Commissioner Shah "to cover their medically necessary orthopedic footwear and compression stockings as prescribed by their doctors" (see Plaintiffs' Notice of Motion for Temporary Restraining Order on Notice and Expedited Hearing; Docket # 8).

Defendant Commissioner Shah respectfully submits that the plaintiffs' requested relief should be denied as a matter of law because mandatory relief is improper, especially when the subject legislative amendment has been in effect for a year (i.e., effective April 2011) (see Complaint at ¶¶ 17 - 19; Docket # 1).1 Therefore, any TRO would not serve to preserve the *status quo*. In addition,

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1 "Medicaid had paid for his molded shoes for ten years *before the new law became effective in April 2011*." Complaint, par. 17 [*emphasis added*].

plaintiffs' claims fail to state claims upon which relief can be granted as a matter of law.

STANDARD

The Court in *Langer v. New York State Office of Court Admin.*, 1998 WL 543792, 1 (W.D.N.Y.) (W.D.N.Y.,1998) set forth the following standard:

> A party seeking a TRO must show (1) that the movant will suffer irreparable harm if such relief is not forthcoming and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the favor of the movant. *Warner–Lambert Co. v. Northside Development Corp.,* 86 F.3d 3, 6 (2d Cir.1996); *Jackson Dairy, Inc. v. H.P. Hood & Sons,* 596 F.2d 70, 72 (2d Cir.1979). The purpose of a TRO is " 'to preserve an existing situation *in statu quo" '* until the movant's forthcoming application for a preliminary injunction may be fully considered. *Warner Bros. Inc. v. Dae Rim Trading, Inc. .,* 877 F.2d 1120, 1125 (2d Cir.1989) (quoting *Pan American World Air. v. Flight Eng. Intern. Assoc.,* 306 F.2d 840, 842 (2d Cir.1962)).

ARGUMENT

POINT I: MANDATORY RELIEF IS IMPROPER AS A MATTER OF LAW.

Plaintiffs' application to the Court is contrary to law. Mandatory relief may not be included in a temporary restraining order. *Warner Bros. Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120, 1124-25 (2d Cir. 1989). By definition, temporary restraining orders are limited to preserving the *status quo*. *Pan American World Airways, Inc. v. Flight Engineers' Int'l Ass'n*, 306 F.2d 840, 842-43 (2d Cir. 1962) ('[P]urpose of a temporary restraining order is to preserve an existing situation in *status quo* until the court has an opportunity to pass upon the merits of the demand for a preliminary injunction."). Mandatory relief pursuant to a Temporary Restraining Order are injunctions that alter the *status quo*. *Phillip v. Fairfield Univ.*, 118F.3d 131, 133 (2d Cir. 1997)(mandatory injunction "alter[s], rather than

preserve[s], the *status quo* by commanding some positive act"). See also *Langer v. New York State Office of Court Admin.*, 1998 WL 543792, 1 (W.D.N.Y.) (W.D.N.Y.,1998) (In denying TRO application, the Court also noted "that the subject amendment has been in effect for more than six months and that any TRO would therefore not serve to preserve the *status quo*").

Here, the plaintiffs' Temporary Restraining Order application is clearly inapposite to the meaning of "restraint". Wherefore, defendant Commissioner Shah respectfully requests that the Court deny the plaintiffs' untimely and improper application for a temporary restraining order.

POINT II: PLAINTIFFS' CLAIMS ARE NOT LIKELY TO SUCCEED.

Plaintiffs raise seven (7) Claims for relief in their Complaint based on various Medicaid, American with Disabilities Act and § 504 of the Rehabilitation Act violations. As to the Medicaid violation claims numbered First (1st), Second 2nd), and Third (3rd)in the Complaint, New York District Courts have held that these Medicaid provisions do not provide for a private right of action. See *Ravenwood v. Daines*, 2009 WL 2163105, 1 (Hon. C. J. Siragusa, W.D.N.Y.) (W.D.N.Y.,2009); analyzed *Casillas v. Daines*, 580 F.Supp.2d 235 (S.D.N.Y.2008) (None of these provisions--[i.e., 42 USC 1396(a)(10)(A) (requirement to make "medical assistance" available), 42 USC 1396(a)(10)(B) (comparability of services), and 42 USC 1396(a)(17) ("reasonable standards" for medical assistance)]--conferred unambiguous rights on plaintiff to receive services); See also, *Lankford v. Sherman*, 451 F.3d 496 (C.A.8 (Mo.),2006) (Private right of action under § 1983 did not exist to enforce Medicaid provision

that required state plan for medical assistance to include reasonable standards, comparable for all groups, for determining eligibility for, and extent of, medical assistance under that plan, since provision, among other things, was not framed in terms of individuals benefited, focus was on standards themselves and on their aggregate impact, rather than on benefits to individuals, and provision provided guidance only regarding financial means of potential beneficiary. 42 U.S.C.A. §§ 1396a(a)(10), 1396a(a)(17); 42 U.S.C.A. § 1983).

Plaintiffs' fourth (4th) Claim is based on a Fourteenth Amendment Due process violation and fares no better. Judicial restraint should be exercised during a review of a Medicaid legislative act. The Court in *RAM*, *infra* at 282, stated in pertinent part,

> The due process argument is equally without merit. Plaintiffs ask this court to strike down the exercise of legislative discretion specifically vested in the Legislature by the Constitution. The presumption in favor of constitutionality is strong, particularly where the challenge is addressed to remedial legislation dealing with the economy and social benefits and burdens, peculiarly legislative functions (*Dandridge v Williams*, 397 U.S. 471, 484-485). There is no violation of the State Constitution. Nor is there a violation of the due process clause of the Federal or State Constitution.

RAM v. Blum, 77 A.D.2d 278, 279 (1st Dept. 1980). Here, the public's "notice" or awareness of the proposed changes was accomplished in the political process accompanied by the bill's passage through the state legislature." *Himes v. Sullivan*, 806 F. Supp. 413 (W.D.N.Y. 1992).

To the extent that the plaintiffs bring a facial challenge to the legality of the enabling legislation itself, they bring a challenge which is generally disfavored. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223 (1990). In the absence of any

First Amendment claim, plaintiffs must demonstrate that the challenged law "could never be applied in a valid manner." *Sanitation and Recycling Indus., Inc. v. City of N.Y.*,107 F.3d 985, 992 (2d Cir. 1997) (citing *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 11 (1988)). It has made no such showing here.

The threshold inquiry in any substantive due process analysis is determining whether the statute at issue burdens a fundamental right. The Supreme Court has urged extreme caution in attaching the "fundamental right" label to an asserted liberty interest. In doing so, the Court has warned, the judiciary takes the substantive matter at stake completely out of the political arena and arrogates to the courts powers that heretofore had been exercised by the legislature:

> By extending constitutional protection to an asserted right or liberty interest, we to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court.

Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (internal citations omitted). Accordingly, courts should extend due process protection only to those fundamental rights "which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Washington*, *supra*, 521 U.S. at 720-21 (internal citations omitted).

Plaintiffs' ADA and § 504 Rehabilitation claims (i.e., Fifth, Sixth and Seventh) are without any basis in law or fact. The Second Circuit Court of

Appeals in Tylicki v. St. Onge, 297 Fed.Appx. 65, 66-67, 2008 WL 4726328, 1 (2d Cir. (N.Y.) 2008)set forth the standard:

> Claims under Title II of the ADA and section 504 of the Rehabilitation Act are treated identically. Henrietta D. v. Bloomberg, 331 F.3d 261, 272 (2d Cir.2003). To establish a prima facie violation of the ADA and the Rehabilitation Act, a plaintiff must demonstrate (1) that he is a qualified individual with a disability; (2) that the defendants are subject to the ADA or the Rehabilitation Act; and (3) that he was denied the opportunity to participate in or benefit from the defendants' services, programs, or activities, or was otherwise discriminated against by the defendants because of his disabilities. Powell v. National Bd. of Medical Examiners, 364 F.3d 79, 85 (2d Cir.2004). Discrimination includes the failure to make a reasonable accommodation. Henrietta D., 331 F.3d at 273. An individual is considered disabled in this context if he has a physical or mental impairment that substantially limits one or more major life activities. See 42 U.S.C. § 12102(2); 29 U.S.C. § 705(20)(B).

This Court's decision in *Ravenwood v. Daines*, 2009 WL 2163105, 1 (Hon. C. J. Siragusa, W.D.N.Y.) (W.D.N.Y.,2009) addresses the deficiency of plaintiffs' discrimination claims, to wit: "Plaintiff argues that if a treatment is given for one diagnosis, then it must be given for *any* diagnosis, and discrimination on the basis of medical diagnosis is constitutionally irrational. This assertion has the same logical fallacy discussed in Judge Castel's rhinoplasty hypothetical. *Casillas*, 580 F.Supp.2d at 244, n. 4."

CONCLUSION

Here, because Plaintiffs seek a temporary restraining order that would provide them with affirmative relief *changing* the status quo, they have not shown “specific facts” that “clearly show” their entitlement to a temporary restraining order, and for this reason their motion for a temporary restraining order should be

denied as a matter of law. *Sosa v. Lantz*, 660 F.Supp.2d 283, 290

(D.Conn.,2009).

Dated: April 4, 2012
Rochester, New York

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CERTIFICATE OF SERVICE

I certify that on April 4, 2012, I electronically filed the foregoing Memorandum of Law, with the Clerk of the District Court using CM/ECF system, which sent notification of such filing to the following:

1. Bryan D. Hetherington: bhetherington@empirejustice.org
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And, I hereby certify that I have mailed, by the United States Postal Service, the document to the following non-CM/ECF participant(s):

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