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2 NOT FOR PUBLICATION

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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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9 Robert Lundergan; Darlene Lundergan,
10 individually and as guardians and
11 conservators of Michael Lundergan, an
12 incapacitated adult,

No. 10-CV-1211-PHX-GMS

AMENDED ORDER

11 Plaintiffs,

12 vs.

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14 State of Arizona;; Arizona Department of
15 Economic Security, a political subdivision;
16 Arizona Health Care Cost Containment
17 System Administration, a political
18 subdivision,

17 Defendants.

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20 Pending before the Court is Plaintiff’s Emergency Motion for Temporary Restraining
21 Order and Stay of Administrative Decision. (Dkt. # 2.) For the following reasons, the Court
22 denies the Motion without prejudice.

23 The Complaint alleges the following facts. Plaintiffs Robert Lundergan and Darlene
24 Lundergan are the legal guardians and conservators of Michael Lundergan, an incapacitated
25 adult. Michael was born with multiple health problems, requiring extensive treatment.
26 Michael’s treatment has generally included in-home nursing care provided 24 hours per day
27 and 365 days per year.

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As a result of a settlement in a prior case, the Lundergans received payments through

1 Arizona's Benefits Option program from the Arizona Department of Administration
2 ("ADOA"). In July 2007, however, the ADOA informed the Lundergans that it would stop
3 making health care payments and that Michael's future care needs would be met by the
4 Lundergans' health plan vendor, United HealthCare Insurance Company ("United").¹ In
5 August 2007, the ADOA and United informed the Lundergans that Michael's care would be
6 reduced from 24 hours per day to 2 hours per day.

7 The Lundergans then filed a complaint on Michael's behalf in Pima County Superior
8 Court seeking to enjoin the State of Arizona, United, and the ADOA to provide 24-hour care.
9 In March 2008, the parties reached a settlement agreement, which guaranteed Michael 24-
10 hour care through a newly-retained third-party nursing care provider, AristoCare. Under the
11 agreement, the defendants in that action agreed to make distributions to AristoCare to fund
12 Michael's ongoing care.

13 In July 2009, however, the ADOA informed the Lundergans that United would no
14 longer serve as the plan administrator and that Michael would be allotted only 168 hours of
15 home healthcare service per year. The Lundergans were then given an option to choose a
16 168-hour plan during the open enrollment period. In August, the ADOA partially recanted,
17 stating that United would continue to provide one of the medical plan options and that United
18 would help the Lundergans find alternatives for Michael's care. Despite this promise, the
19 Complaint alleges that the Lundergans never received any assistance and that Michael's care
20 was reduced in violation of the settlement agreement reached in March 2008.

21 In September 2009, the Lundergans filed a complaint in Pima County Superior Court
22 against the State of Arizona, United, and ADOA, requesting a temporary restraining order
23 ("TRO") enjoining defendants from reducing Michael's benefits. The State removed the case
24 to Maricopa County Superior Court. While Judge Trujillo granted the request for a TRO, the
25 case was transferred to Judge Ronan, who, after an evidentiary hearing, denied the request
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27 ¹ Arizona contracted with United to serve as a third party administrator to administer
28 health benefits available under Arizona's Benefits Option self-insurance program.

1 for a preliminary injunction in March 2010. The Lundergans then filed a Petition for Special
2 Action with the Arizona Court of Appeals, which accepted jurisdiction and affirmed Judge
3 Ronan’s denial of the request for a preliminary injunction.

4 In addition to the payments sought through United and the ADOA, it appears that the
5 Lundergans also had been receiving payment from the Arizona Department of Economic
6 Security’s Division of Developmental Disabilities (“DES/DDD”). DES/DDD had provided
7 the Lundergans with funding to receive 257.3 hours of nursing per month, or a little more
8 than 8 hours per day. In April 2010, DES/DDD then concluded that Michael qualified for
9 a Level 2 medical rate, which authorized DES/DDD to provide Michael with 8 hours per day
10 of nursing care and 12 hours per day of attendant care. The Lundergans responded that the
11 offer was insufficient and sought an expedited appeal of the decision. This request for an
12 expedited appeal was denied. Although DES/DDD later determined that Michael qualified
13 for a Level 3 service rate, which is the highest level of home and community based service
14 (“HCBS”) provided, the Lundergans still requested 24-hour in-home care. The request was
15 denied because it was not cost-effective or federally-reimbursable. The Lundergans
16 requested that DES/DDD provide them with an expedited state fair hearing, but DES/DDD
17 set the hearing for approximately four weeks from now.

18 The Lundergans then filed this case, seeking injunctive relief, as well as fees and
19 costs. The Lundergans raise two claims: (1) violation of Title XIX of the Social Security Act
20 (“Medicaid Act”), 42 U.S.C. § 1396, *et seq.*, and (2) violation of 42 U.S.C. § 1983.

21 DISCUSSION

22 “The standard for issuing a [temporary restraining order] is the same as that for
23 issuing a preliminary injunction.” *Phillips v. Fremont Inv. & Loan*, 2009 WL 4898259 at *1
24 (D. Ariz. Dec. 11, 2009) (citing *Brown Jordan Int’l, Inc. v. The Mind’s Eye Interiors, Inc.*,
25 236 F. Supp. 2d 1152, 1154 (D. Haw. 2007)). Therefore, a district court may grant a
26 preliminary injunction or temporary restraining order under two sets of circumstances.
27 *Guzman v. Shewry*, 552 F.3d 941, 948 (9th Cir. 2009). Under the traditional criteria, a
28 plaintiff must demonstrate: “(1) a strong likelihood of success on the merits, (2) the

1 possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance
2 of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain
3 cases).” *Id.* (internal quotations omitted). Alternatively, a temporary restraining order or
4 preliminary injunction is appropriate “if the plaintiff demonstrates *either* a combination of
5 probable success on the merits and the possibility of irreparable injury *or* that serious
6 questions are raised and the balance of the hardships tips sharply in [its] favor.” *Id.* (internal
7 quotations omitted). While a showing of serious questions on the merits is a lower standard
8 than showing probable success, Plaintiffs nonetheless must demonstrate at least a “fair
9 chance of success.” *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 937 (9th Cir.
10 1987).

11 Plaintiffs’ Motion for TRO does not explain how they have either demonstrated
12 probable success on the merits or raised serious questions on the merits. The majority of the
13 Motion recites various facts alleged in the Complaint, but the Motion lacks both meaningful
14 analysis and citation to authority.

15 **A. 42 U.S.C. § 1396, *et seq.***

16 The Complaint alleges a violation of the Medicaid Act, 42 U.S.C. § 1396, *et seq.*,
17 which governs grants to states for medical assistance programs. This claim challenges only
18 the sufficiency of the benefits received from DES/DDD, which distribute state funding for
19 Arizona Health Care Cost Containment System (“AHCCCS”), Arizona’s Medicaid system.
20 While states opting to participate in Medicaid programs must follow appropriate federal
21 statutes and regulations, *see J.K. By & Through R.K. v. Dillenberg*, 836 F. Supp. 694, 696
22 (D. Ariz. 1993), Plaintiffs have not explained what *specific* statutes or regulations Defendants
23 have violated by declining to provide Michael with 24-hour in-home care.

24 The Complaint correctly notes that the goal of the Medicaid Act is to “enabl[e] each
25 State, as far as practicable . . . to furnish . . . medical assistance on behalf of families with
26 dependent children and of aged, blind, or disabled individuals, whose income and resources
27 are insufficient to meet the costs of necessary medical services.” *AlohaCare v. Haw. Dep’t*
28 *of Human Servs.*, 572 F.3d 740, 742 (9th Cir. 2009) (quoting 42 U.S.C. § 1396-1).

1 Specifically, the Complaint cites 42 C.F.R. § 440.230(b), which states, “Each service must
2 be sufficient in amount, duration, and scope to reasonably achieve its purpose.” Plaintiffs,
3 however, do not explain how receiving the maximum HCBS benefits that DES/DDD can
4 provide is a violation of this sufficiency requirement.

5 “Medicaid programs do not guarantee that each recipient will receive that level of
6 health care precisely tailored to his or her particular needs.” *Alexander v. Choate*, 469 U.S.
7 287, 303 (1985). The Medicaid Act gives states like Arizona “substantial discretion to
8 choose the proper mix of amount, scope, and duration limitations on coverage, as long as
9 care and services are provided in ‘the best interest of recipients.’” *Id.* (quoting 42 U.S.C. §
10 1396a(a)(19)); *see also Parry By and Through Parry v. Crawford*, 990 F. Supp. 1250, 1257
11 (D. Nev. 1998) (explaining that states have “great flexibility” under 42 C.F.R. § 440.230(b)
12 “to determine the scope and duration” of state-funded treatment for individuals); *Callen v.*
13 *Rogers*, 216 Ariz. 499, 503 (Ct. App. 2007) (explaining that the Medicaid Act “does not
14 require that the ‘medical assistance’ be provided to the extent needed by every individual
15 recipient of benefits,” but rather that states have the discretion “to place usage limitations on
16 the assistance even if the limitations are inconsistent with an individual recipient’s personal
17 medical needs”) (citing 42 C.F.R. § 440.230(d) (permitting state plans to impose coverage
18 limitations based on medical necessity and utilization review)).

19 For example, in *Alexander*, the Supreme Court held that Tennessee’s Medicaid plan
20 could limit inpatient hospital stays to fourteen days, despite the Medicaid Act’s requirement
21 that states cover inpatient hospital services. 468 U.S. at 309. While Tennessee’s plan would
22 not provide care for certain individuals requiring extended hospital stays, the Medicaid Act
23 does not require that a state plan meet each individual’s needs as long as the general
24 application of services offered meets the goals and regulations of the Medicaid Act. *Id.* at
25 303. In the present case, Defendants have declined to offer Michael DES/DDD benefits that
26 would fund 24-hour per day in-home care. Plaintiffs do not explain, however, why this
27 decision violates the Medicaid Act. Nor do Plaintiffs explain how their Medicaid Act claim
28 is anything other than a request for *individual* health care benefits for Michael, as opposed

1 to an argument that AHCCCS as a whole has failed to provide sufficient care.²

2 Moreover, the federal government has granted the State of Arizona the authority to
3 provide HCBS in an amount “that does not exceed the cost of providing care to the eligible
4 individual in an institutional setting.” The Demonstration Project, *available at*
5 azahcccs.gov/reporting/Downloads/AZ1115Waiver_6-22-09.pdf. Under this authority
6 granted by the Demonstration Project, the State of Arizona has the discretion to cap the
7 benefits that individuals like Michael can receive for in-home care. At the TRO hearing,
8 Defendants’ counsel explained that Defendants had already offered Michael the maximum
9 amount allowed by the Demonstration Project. It further appears that Defendants have
10 offered to provide Michael with group home care, where Michael would be able to receive
11 care 24-hours per day; apparently, Plaintiffs have rejected this offer. Plaintiffs do not explain
12 how, given the Demonstration Project as governed by existing federal and state law,
13 Defendants’ refusal to provide 24-hour in-home care is a violation of the Medicaid Act.
14 Defendants have still offered the maximum allowable under the Demonstration Project and
15 have offered an alternative under which Michael would receive 24-hour care. Thus, to the
16 extent Plaintiffs request that Defendants provide services the cost of which exceed the cost
17 of institutional care, Plaintiffs’ request does not appear to be supported by the Medicaid Act.

18 This argument is echoed by the Arizona Administrative Code, which provides that
19 services are covered if they are “medically necessary, cost effective, and federally
20 reimbursable.” Ariz. Admin. Code § R9-28-201(1). Again, while Plaintiffs contend that 24-
21 hour care is medically necessary, they do not explain how such services are either cost-
22 effective or federally-reimbursable under state or federal law.

25 ² At the TRO hearing, Plaintiffs’ counsel cited *V.L. v. Wagner*, 669 F. Supp.2d 1106
26 (N.D. Cal. 2009), which held that California’s reduction of in-home care services for 97,000
27 recipients violated the Medicaid Act’s sufficiency requirement. Not only was *V.L.* decided
28 on other grounds as well, but also *V.L.* challenged an overall policy reduction for in-home
care, rather than a challenge to limits on services provided to a single individual.

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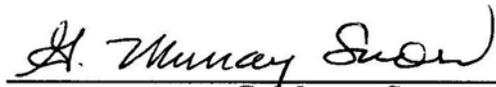
B. 42 U.S.C. § 1983

Plaintiff also alleges a claim based on 42 U.S.C. § 1983, which provides a cause of action for a plaintiff who was deprived of a right secured by the Constitution or laws of the United States by those acting under color of state law.” *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999) (citing 42 U.S.C. § 1983). Neither the Complaint nor the Motion explains what, if any, federal rights were violated. To the extent Plaintiffs allege a § 1983 claim as a vehicle to bring a claim for a violation of the Medicaid Act, this claim fails as Plaintiffs have not raised serious questions on the merits of a Medicaid Act claim.

CONCLUSION

IT IS THEREFORE ORDERED that Plaintiffs’ Motion for a Temporary Restraining Order and Stay of Administrative Decision (Dkt. # 2) is **DENIED WITHOUT PREJUDICE**.

DATED this 12th day of July, 2010.



G. Murray Snow
United States District Judge