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14 IN THE UNITED STATES DISTRICT COURT
15 FOR THE NORTHERN DISTRICT OF CALIFORNIA

16 LILLIE BRANTLEY, by her guardian ad)	Case No.: 4:09-cv-03798-SBA
litem Chauncey Mc Lorin; GILDA GARCIA;)	
17 ALLIE JO WOODARD, by her guardian ad)	CLASS ACTION
litem Linda Gaspard-Berry, individually and)	
18 on behalf of all others similarly situated,)	NOTICE OF MOTION AND MOTION FOR
)	PRELIMINARY INJUNCTION;
)	MEMORANDUM OF POINTS AND
20 Plaintiffs,)	AUTHORITIES IN SUPPORT
)	
21 vs.)	Date: September 8, 2009
)	Time: 1:00 pm
22 DAVID MAXWELL-JOLLY, Director of the)	Location: 1301 Clay Street, Oakland, CA
Department of Health Care Services, State of)	Courtroom: 3, 3 rd Floor
23 California, DEPARTMENT OF HEALTH)	
24 CARE SERVICES,)	
)	
25 Defendant.)	
)	

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1
2 **NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION**

3 TO DIRECTOR DAVID MAXWELL-JOLLY, THE DEPARTMENT OF HEALTH CARE
4 SERVICES AND THEIR ATTORNEYS OF RECORD: PLEASE TAKE NOTICE that on
5 September 8, 2009, at 1:00 p.m., or soon thereafter as counsel may be heard before Judge Sandra
6 Armstrong, in Courtroom 3, United States District Court, Northern District of California, located at
7 1301 Clay Street, Oakland, CA, Plaintiffs individually and on behalf of class members, will move
8 the Court pursuant to Rule 65(a) of the FRCP and Rule 65-2 and 7-2 of the Local Civil Rules for an
9 order issuing a Preliminary Injunction immediately enjoining Defendants and their successors,
10 agents, officers, servants, employees, attorneys and representatives and all persons acting in concert
or participating by:

11 (a) Enjoining and prohibiting Defendants Director David Maxwell-Jolly and the Dept. of
12 Health Care Services, and successors, agents, officers, servants, employees, attorneys and
13 representatives and all persons acting in concert or participating with Defendants, from
14 implementing or enforcing ABX4 5 or engaging in the following actions until this Court rules on a
15 permanent injunction:

16 Reducing, terminating or modifying Medi-Cal Adult Day Health Care (ADHC) program
17 benefits to the Plaintiffs and Class Members from 4 or 5 days per week, to a maximum of 3
18 days per week, pursuant to ABX4 5, in violation of their rights under the ADA, Section 504,
the Due Process clause of the Constitution, and the Medicaid Act.

19 Reducing, terminating or modifying Medi-Cal Adult Day Health Care (ADHC) program
20 benefits to the Plaintiffs and Class Members from 4 or 5 days per week, to a maximum of 3
21 days per week, pursuant to ABX4 5, unless and until alternate Medi-Cal services are
22 provided, including through reasonable modifications to the program, which prevent
23 inappropriate institutionalization in violation of their rights under the ADA and Section 504.

24 (b) Enjoining and prohibiting Defendant Director David Maxwell-Jolly and his
25 successors, agents, officers, servants, employees, attorneys and representatives and all persons acting
26 in concert or participating with Defendants, from implementing or enforcing ABX4 5 or engaging in
27 the following actions until this Court rules on a permanent injunction:

28 Reducing, terminating or modifying Medi-Cal Adult Day Health Care (ADHC) program
benefits to the Plaintiffs and Class Members from 4 or 5 days per week, to a maximum of 3
days per week, pursuant to ABX4 5, until and unless Plaintiffs and Members are afforded
notice and a right to a hearing regarding alternate Medi-Cal services which meet their
medical needs as currently provided through ADHC services in violation of their rights under
the Due Process clause of the Constitution, and the Medicaid Act.

1 (c) Granting a Preliminary Injunction compelling Defendants, their officers, agents,
2 employees, attorneys, and all persons who are in active concert or participation with them, to take all
3 actions necessary within the scope of their authority to implement the above injunctions; and
4 ordering Defendants to maintain this Preliminary Injunction until such time as this Court rules on a
5 permanent injunction in this case.

6 Plaintiffs further request that the Court waive the requirement for the posting of a bond as
7 security for the entry of preliminary relief, on the grounds of Plaintiffs' indigency.

8 This Motion for a Preliminary Injunction is based upon this Notice of Motion and Motion, a
9 copy of the Complaint, the Memorandum of Points and Authorities, the Proposed Preliminary
10 Injunction Order, and declarations and exhibits filed in this matter and upon such oral and written
11 argument as may be presented at the hearing on the Motion.

12 The Motion will be made on the ground that Plaintiffs and Class Members will suffer
13 irreparable injury unless the activities described above are enjoined.

14 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**

15 **I. SUMMARY OF ARGUMENT**

16 On September 10, 2009, unless this Court issues a Preliminary Injunction, illegal and
17 devastating cuts to the Adult Day Health Care (ADHC) benefit under the State Medi-Cal program
18 will take place, causing irreparable harm to thousands of elderly and disabled individuals.

19 On that date, A.B. 5, 4th Ex. Sess. (Cal. 2009) (Chapter 5, Statutes of 2009) (ABX4 5) is
20 scheduled to go into effect. The ADHC program provides cost-effective community based services
21 to thousands of Californians, enabling them to avoid unnecessary hospitalization and
22 institutionalization, maintain community and family ties, and improve health outcomes. ABX4 5
23 cuts ADHC benefits based solely on economic considerations. The most immediate cut is from a
24 maximum of 5 to 3 days per week for all Medi-Cal beneficiaries, with no exceptions, and regardless
25 of existing treatment authorizations and the health condition of the individual. These two days per
26 week cuts mean the difference between being at home and being institutionalized for the Plaintiffs
27 and others similarly situated.

28 As Plaintiff Lillie Brantley's niece attests, "If my aunt is not able to attend the ADHC 5 times
a week I will not be able to keep her at home, and will have to look for a nursing home for her. I

1 would hate to do it, because she raised me, and I love her very much, and want to keep her with us,
2 but I can't afford to quit my job, which is what I would have to do." (McLorin Decl. ¶¶16, 17.)

3 Without these services, Plaintiffs will experience immediate and irreparable harm. Plaintiffs
4 and other Class Members will be at risk of deterioration in health and functioning, and will be forced
5 into hospitals and nursing facilities due to Defendants' violation of the Americans with Disabilities
6 Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213 (West 2008), and Section 504 of the Rehabilitation
7 Act of 1973 (Section 504), 29 U.S.C. §§ 794-794a (West 2007).

8 Defendants have not issued statutorily required written notice to Plaintiffs informing them
9 that their benefits are being terminated and of their right to a hearing, in violation of federal
10 Medicaid law and the Fourteenth Amendments of the U.S. Constitution.

11 Plaintiffs request that a preliminary injunction be issued prohibiting Defendants from
12 implementing across-the-board cuts from 5 to 3 days per week of ADHC services prior to giving
13 required notices and determining whether alternative services under the Medi-Cal program can meet
14 their needs, including the provision of services with reasonable modifications.

15 **II. STATEMENT OF FACTS**

16 **A. Background of the ADHC Program**

17 Adult Day Health Care (ADHC) is a Medi-Cal funded community-based program for low
18 income seniors and younger disabled adults. Cal. Welf. & Inst. Code ¶ 14521 (West 2009). ADHC
19 services are provided at centers throughout California. Individuals who live at home or in licensed
20 residential care participate from 1 to 5 days per week, depending on their assessed needs.

21 In enacting the ADHC program, the California legislature found that:
22 [T]here exists a pattern of overutilization of long-term institutional care for elderly
23 persons or adults with disabilities, and that there is an urgent need to establish and to
24 continue a community-based system of quality adult day health care which will
25 enable elderly persons or adults with disabilities to maintain maximum independence.
26 . . . [O]verreliance on [nursing facility care] has proven to be a costly panacea in both
27 financial and human terms, often traumatic, and destructive of continuing family
28 relationships and the capacity for independent living.¹

¹ The legislature went on to say:

It is, therefore, the intent of the Legislature in enacting this chapter and related provisions to
provide for the development of policies and programs that will accomplish the following:
(a) Ensure that elderly persons and adults with disabilities are not institutionalized
inappropriately or prematurely.

1 Cal. Health & Safety Code § 1570.2 (West 2009).

2 ADHC centers must provide a full range of medical, nursing, therapeutic, and rehabilitative
 3 services for a daily all-inclusive Medi-Cal reimbursement rate of \$76.22. (Missaelides Decl. ¶21.)

4 Individuals wishing to receive ADHC services must have a physician submit history and
 5 physical information and participate in a 3 day assessment performed by a multidisciplinary team
 6 of clinicians including a physician, registered nurse, social worker, physical therapist and
 7 occupational therapist, at minimum. Cal. Code Regs. tit. 22 (2009) § 54211. The
 8 multidisciplinary team designs an Individual Plan of Care (IPC) that includes recommended days
 9 of attendance, which is then submitted to the Medi-Cal Field Office along with the Treatment
 10 Authorization Request (TAR) for approval by Medi-Cal. (Missaelides Decl. ¶ 22.)

11 Defendants ensure that *each* participant in the ADHC program meets “Medical Necessity
 12 Criterion #4” by requiring that the “yes” box be checked for “Criterion 4” in the IPC:

(16) MEDICAL NECESSITY CRITERION #4		
Criterion Met		A high potential exists for the deterioration of the participant’s medical, cognitive, or mental health condition or conditions in a manner likely to result in emergency department visits, hospitalization, or other institutionalization if ADHC services are not provided.
Yes O	No O	

16 Cal. Welf. & Inst. Code § 14526.1(d)(4); (Davis Decl. ¶ 18; Ex. A, p.4; McCloud Decl. ¶ 17, Ex. A,
 17 p.4; Toth Decl. ¶¶ 13-14, Ex. A, p.4; Puckett Decl. ¶ 12; Myers Purkey Decl. ¶ 17, Ex. 1, p.4.)

18 **B. ADHC Services Compared to other Medi-Cal Services**

- 19
- 20
- 21 (b) Provide a viable alternative to institutionalization for those elderly persons and adults with
 22 disabilities who are capable of living at home with the aid of appropriate health care or
 23 rehabilitative and social services.
- 24 (c) Establish adult day health centers in the community for this purpose, that will be easily
 25 accessible to all participants, including economically disadvantaged elderly persons and
 26 adults with disabilities, and that will provide outpatient health, rehabilitative, and social
 27 services necessary to permit the participants to maintain personal independence and lead
 28 meaningful lives.
- (d) Include the services of adult day health centers as a benefit under the Medi-Cal Act, that shall
 be an initial and integral part in the development of an overall plan for a coordinated,
 comprehensive continuum of optional long-term care services based upon appropriate
 need. . . .

Cal. Health & Safety Code § 1570.2 (West 2009).

1 Many of these same services that are part of the ADHC package are also included as
 2 community-based Medicaid services and would be otherwise available to Plaintiffs and Class
 3 Members as an alternative to ADHC. Medi-Cal also covers skilled nursing facilities – institutional
 4 care – for beneficiaries. *See* “Comparison of Statutes and Regulations Relating to Provision of
 5 Services” attached to Declaration of Elizabeth Zirker as Exhibit A.

6 **C. ABX4 5 Makes Devastating Cuts to Program**

7 ABX4 5 is scheduled to go into effect on September 10, 2009. The new law reduces the
 8 ADHC benefit to 3 days per week for all Medi-Cal beneficiaries, with no exceptions. Cal. Welf. &
 9 Inst. § 14132(p)(2).² These cuts are based on financial considerations. No reevaluations have been
 10 done of individuals to determine whether they still need services or qualify for other available
 11 services. (Missaelides Decl. ¶ 32, Exh. D.)

12 **D. Plaintiffs**

13 **1. Lillie Brantley**

14 Plaintiff Lillie Brantley is an 84-year-old woman who has severe Alzheimer’s disease,
 15 hyperlipidemia, a seizure disorder, atrial fibrillation, has had a stroke, and is very frail. (Davis Decl.
 16 ¶ 28.) Ms. Brantley lives with her niece Chauncey McLorin³ and Ms. McLorin’s 15-year old
 17 daughter. Because of her cognitive impairments, Ms. Brantley can never be left alone. (McLorin
 18 Decl. ¶ 6.) Ms. Brantley and her family want her to remain in her family home, where she can be
 19 part of the household, and among people and places she knows and loves. According to Ms.
 20 McLorin, putting Ms. Brantley into a nursing home would be devastating: “It is so painful to
 21 consider this, and even though she is deteriorating, she is not in a vegetative state, and still knows

22
 23 ² In addition to this cut, new restrictions limiting who is eligible to receive ADHC services will go
 24 into effect if and when the Director of DHCS provides a written declaration that new restrictions are
 25 ready to be implemented. Cal. Welf. & Inst. Code § 14521.1. These new restrictions will terminate
 26 or deny ADHC services to individuals based on degree of functional limitation and need for a certain
 27 level of care. The statute provides that at the time of the declaration of new restrictions by the
 28 Director, the ADHC benefit will revert back to a maximum of 5 days per week for the individuals
 who remain eligible. Cal. Welf. & Inst. Code §§ 14525.1, 14522.4(a)(10). Plaintiffs have alleged
 that these new restrictions violate the law, however, as they are not yet in place, Plaintiffs do not
 seek a Preliminary Injunction regarding this component of ABx4 5.

³ Ms. McLorin has applied to act as a Guardian Ad Litem for Ms. Brantley in this action.

1 me and my family, and our neighborhood. We go to church together, and out to eat. I think it would
2 be terrible for her to have to leave us.” (*Id.* at ¶¶ 17-18.) However, Ms. Brantley’s family will be
3 forced to institutionalize her if she is not able to go to the ADHC program 5 days a week, as Ms.
4 McLorin cannot afford to quit her job. (*Id.* at ¶¶ 8, 16).

5 Ms. Brantley has been attending the Bayview Hunter’s Point ADHC program in San
6 Francisco California for 3 years. (*Id.* at ¶ 4.) Ms. Brantley is authorized under Medi-Cal to receive
7 ADHC services 5 days per week, and these services including professional nursing services every
8 day to monitor her hypertension, monitor and control her seizures, and monitor her for weight loss;
9 personal care services every day to help her with feeding, toileting, and ambulation, as well as
10 monitoring her whereabouts; physical therapy maintenance program twice per week to reduce her
11 risk for falls and maintain current functioning; occupational therapy services for maintaining her
12 functional strength; and nutritional monitoring because of her diagnosis of hypertension and her
13 recent weight loss. (Davis Decl. ¶¶ 26, 30.)

14 Ms. Brantley’s most recent IPC, which is approved by Medi-Cal, documents that she is at
15 high risk of institutionalization if she does not receive ADHC services 5 days per week, due to her
16 inappropriate behavior and affect, two or more chronic medical conditions, poor judgment,
17 medication mismanagement, frailty, isolation, risk for falls, including forgetting to use her cane and
18 being unsafe in transfers, self neglect, and dementia-related behavioral problems. (*Id.* at ¶ 31.)

19 As of August 21, 2009, Ms. Brantley has not received written notice from Medi-Cal
20 informing her that her ADHC services will be cut and advising her of her right to a hearing.
(McLorin Decl. ¶ 15.)

21 **2. Allie Jo Woodard**

22 Plaintiff Allie Jo Woodard is a 79-year-old woman who is diagnosed with bipolar affective
23 disorder, depression, glaucoma, hypertension, osteoarthritis, and is pre-diabetic. (Davis Decl. ¶ 21.)
24 Ms. Woodard receives Medi-Cal, and is authorized to receive ADHC service 5 days per week at the
25 Bayview Hunter’s Point ADHC program in San Francisco California. (*Id.* at ¶ 20.) She has been
26 attending the program for nine years. (Gaspard-Berry Decl. ¶ 4.) Ms. Woodard’s disability causes
27 her to be very fragile emotionally, and she has had frequent psychiatric hospitalizations as a result.
28 (*Id.* at ¶ 9.) Her daughter, Linda Gaspard-Berry, believes that Ms. Woodard’s attendance and

1 services at the ADHC 5 days per week are essential to support her, and that without the program's
2 services, Ms. Woodard would have been hospitalized more frequently than she has been.⁴ *Id.*

3 Although Ms. Woodard lives alone, after a two-day disappearance a few years ago, her
4 family ensures that she is never alone. (*Id.* at ¶ 6.) Her daughter and son taking turns spending the
5 nights with her, as they juggle full time jobs and their own families. (*Id.* at ¶ 7.) On the weekends,
6 her daughter takes Ms. Woodard to Ms. Gaspard-Berry's home in Fremont, California. (*Id.* at ¶ 8.)

7 Ms. Woodard's family goes to great lengths to keep her in her home and depend on her
8 attending ADHC 5 days per week. Her daughter says, "My brother and I are working very hard, and
9 are sacrificing a lot already to try to keep our mother in the community. It would be terrible for her
10 to be in a facility, but we cannot afford to quit our jobs and put our families at risk." (*Id.* at ¶ 17.)

11 Ms. Woodard's most recent Medi-Cal approved Individual Plan of Care authorizes her to
12 receive the following ADHC services 5 days per week: professional nursing services every day to
13 monitor her for fall risk, for her hypertension, and for her pain and mobility related to her arthritis;
14 personal care services daily to monitor her exertion level to prevent cardiac compromise; social
15 services intended to prevent psychiatric hospitalization in the form of group activities, weekly
16 psychological counseling, and daily check in with the program social worker to reorient her to
17 reality; therapeutic activities to decrease her feelings of isolation, and improve her interactions with
18 peers; occupational therapy services for maintaining functional strength two days per week. (Davis
19 Decl. ¶ 23.) Ms. Woodard's current IPC, authorized by Medi-Cal through December 31, 2009,
20 states that she is at a high risk of institutionalization if she does not receive ADHC services 5 days
21 per week, based on her chronic medical conditions, poor judgment, medication mismanagement,
22 frailty, isolation, risk for falls, and dementia-related behavioral problems. (*Id.* at ¶ 31.)

23 As of August 21, 2009, Ms. Woodard has not received written notice from Medi-Cal
24 informing her that her ADHC services will be cut and advising her of her right to a hearing.
(Gaspard-Berry Decl. ¶ 14.)

25 **3. Gilda Garcia**

26 Plaintiff Gilda Garcia is a 77-year-old woman with unstable diabetes, hypertension, Bells'
27

28 ⁴ Ms. Gaspard-Berry has applied to act as a Guardian Ad Litem for Ms. Woodard in this action.

1 Palsy, and kidney problems. (McCloud Decl. ¶ 21.) She is Medi-Cal eligible and currently receives
2 5 days a week of ADHC through the Institute on ADHC program in San Francisco, California. (*Id.*
3 at ¶¶ 19.) Ms. Garcia lives alone, and receives limited IHSS services. (Garcia Decl. ¶¶ 4, 14.)

4 Ms. Garcia is highly dependent on the ADHC program for medical stability and preventing
5 isolation and depression. She says, “I love going to the center. It gives me a place to go everyday,
6 and things to do. . . I also go to the center because they help me with my diabetes there. On the
7 weekends, I just pray not to have problems with my diabetes. I am afraid I will have to go to the
8 hospital if I don’t have a nurse 5 days a week who can help me.” (*Id.* at ¶¶ 7, 8, 9, 16, 18.)

9 In the professional opinion of the nurse at her program, “. . . based on the 4.5 years I have
10 known Gilda, it’s crucial for her to be at the Center Monday through Friday to prevent Emergency
11 Room visits and hospitalizations. I am very concerned for her health and safety if she does not have
12 the daily monitoring we provide here at our program. I don’t know how else she will get this
13 monitoring on the two days she would not attend our program.” (Perelman Decl. ¶¶ 14, 15.)

14 Ms. Garcia’s most recent Medi-Cal approved Individual Plan of Care authorizes her to
15 receive the following ADHC services 5 days per week: professional nursing services 5 times a week
16 to monitor her for hypoglycemic reactions, and monitoring for joint and back pain; personal care
17 services 5 times a week to supervise her ambulation and prevent falls due to her poor vision and
18 impulse control; social services 5 times a week to increase her opportunities for socialization and on
19 an as needed basis help her coordinate her IHSS and other social services; physical therapy
20 maintenance program 3 days per week to maintain her endurance and physical strength; occupational
21 therapy maintenance program two days per week to maintain her current levels of functioning; and
22 registered dietician services. (McCloud Decl. ¶ 24.)

23 Ms. Garcia’s most recent IPC states that she is at a high risk of institutionalization if she does
24 not receive ADHC services 5 days per week, based on her two or more chronic medical conditions,
25 frailty, hyper/hypoglycemia, inappropriate affect/appearance or behavior, poor judgment, risk for
26 falls, and medication mismanagement. (*Id.* at ¶ 25.)

27 As of August 20, Ms. Garcia has not received written notice from Medi-Cal that her services
28 will be cut and advising her of her right to a hearing. (Garcia Decl. ¶ 17.)

E. Failure to Provide Individual Notice

1 Medicaid program recipients have rights to written notice and a predetermination fair hearing
 2 if the benefits they are receiving are reduced, suspended or terminated. 42 C.F.R. § 431.200 *et seq.*
 3 (2009); Cal. Code Regs. tit. 22 § 51014.1.(a). The notice must be sent at least ten days before the
 4 date of the action and must contain a statement of the intended action, the reasons and specific legal
 5 support for the action, and an explanation of the individual’s hearing rights, rights to representation
 6 and to continued benefits. 42 C.F.R. §§ 431.206(b); 431.210 *et seq*; Cal. Code Regs. tit. 22,
 7 §§ 50179(c), 51014.1(c).

8 On July 30, 2009, Defendants informed providers of the ADHC program that Medi-Cal
 9 would no longer approve or pay for a beneficiary to attend an ADHC center for more than 3 days per
 10 week as of August 27, 2009. (Puckett Decl. ¶ 15, Exh. A.) Defendants also posted a notice on the
 11 DHCS website that the “ADHC benefit is reduced to a maximum of 3 days of ADHC per week” and
 12 that: “Effective August 27, 2009, Medi-Cal will only authorize and pay for a maximum of 3 days
 13 per week of Adult Day Health Care.” (*Id.* at ¶ 15, Exh. B.)

14 After Plaintiffs filed this lawsuit, Defendants sent individual notification of the cuts (without
 15 including notification of the right to a hearing) to recipients, but Plaintiffs have not seen the notices
 16 as of the date of this Motion. (Zirker Decl. in Support of Plaintiffs’ Motion for Order Shortening
 17 Time, ¶ 10.) Plaintiffs Lillie Brantley, Gilda Garcia, and Allie Jo Woodard have not received
 18 individualized notice of the cuts to their services providing them with statutorily required hearing
 19 rights. (McLorin Decl. ¶ 15; Garcia Decl. ¶ 17; Gaspard-Berry Decl. ¶ 14.) Upon information and
 20 belief, no class members have received individualized notice of the cuts to their services which
 21 inform them of their statutorily required hearing rights. (Puckett Decl. ¶ 18.)

22 **III. PLAINTIFFS MEET THE REQUIREMENT FOR GRANTING A PRELIMINARY 23 INJUNCTION**

24 **A. Standards for Preliminary Injunction**

25 “A plaintiff seeking a preliminary injunction must establish that he is (1) likely to succeed on
 26 the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that
 27 the balance of equities tips in his favor, and (4) that an injunction is in the public interest.” *Am.*
 28 *Trucking Ass’ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009); *Winter v. Natural Res.*
Def. Council, --- U.S. ---, 129 S. Ct. 365, 374 (2008); *Stormans, Inc. v. Selecky*, 571 F.3d 960, 977-

1 98 (9th Cir. 2009). Plaintiffs meet all four criteria.

2 The Ninth Circuit has traditionally advanced a “sliding-scale” formulation under which
3 injunctive relief is appropriate, among other circumstances, in cases of obvious irreparable injury but
4 where the plaintiff is only able to show that “serious questions going to the merits were raised.”
5 *Benda v. Grand Lodge of the Int'l Ass'n of Machinists & Aerospace Workers*, 584 F.2d 308, 314-15
6 (9th Cir.1978). Many recent decisions continue to use the alternative formulation. *See e.g. Save*
7 *Strawberry Canyon I v. Dept. of Energy*, 613 F. Supp. 2d 1177, 1180 (N.D. Cal. 2009); *Save*
8 *Strawberry Canyon II v. Dept. of Energy*, 2009 WL 1098888, at *3 (N.D. Cal. 2009). *Habeas*
9 *Corpus Res. Ctr. v. United States Dep't of Justice*, 2009 WL 185423, at *5 (N.D.Cal.2009) (after
10 *Winter*, “[w]hen the balance of harm ‘tips decidedly toward the plaintiff,’ injunctive relief may be
11 granted if the plaintiff raises questions ‘serious enough to require litigation.’”). Plaintiffs also meet
12 the alternative formulation.

13 **1. Plaintiffs will Suffer Irreparable Harm in the Absence of an Injunction**

14 Recipients of government benefits frequently constitute the most vulnerable sector of the
15 population. Numerous courts have held that reductions in either government benefits or medical
16 care cause irreparable harm even when the cuts are of a relatively small magnitude. *See e.g.*,
17 *Beno v. Shalala*, 30 F. 3d 1057, 1063-64, fn. 10 (9th Cir. 1994) (noting harm to beneficiaries
18 from government benefit and medical care cuts); *Beltran v. Myers*, 677 F. 2d 1317, 1322 (9th
19 Cir.1982). In *Beltran*, the Plaintiffs were a class of aged, blind, and disabled individuals who
20 were denied Medi-Cal benefits by application of a transfer of assets rule in California. The Court
21 held that by showing loss of the Medi-Cal benefits to the class, the Plaintiffs had demonstrated
22 irreparable injury. *See also Edmonds v. Levine*, 417 F. Supp 2d 1323, 1342 (S.D. Fla. 2006)
23 (summarizing eight different Medicaid cases finding irreparable harm or imminent risk of
24 irreparable harm due to a variety of Medicaid cuts); *Daniels v. Wadley*, 926 F. Supp. 1305, 1313
25 (M.D. Tenn. 1996) *vacated in part on other grounds sub nom Daniels v. Menke*, 145 F.3d 1330
26 (6th Cir. 1998); *Markva v. Haveman*, 168 F. Supp. 2d 695, 719 (E.D. Mich. 2001); *Maine v.*
27 *Ass'n of Interdependent Neighborhoods v. Petit*, 647 F. Supp. 1312, 1315 (D. Me. 1985); *Kai v.*
28 *Ross*, 336 F.3d 650, 656 (8th Cir. 2003); *Caldwell v. Blum*, 621 F.2d 491, 498 (2d Cir. 1980),
cert. denied 452 U.S. 909 (1981).

1 In addition, a violation of civil rights under the ADA and Section 504 because of a state's
2 failure to provide services "in the most integrated setting appropriate," and being placed at "high
3 risk for premature entry into a nursing home," satisfy the standard for granting injunctive relief.
4 *See Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175, 1184-1185 (10th Cir. 2003). In
5 this case, the named Plaintiffs and class members are elderly and/or disabled individuals who
6 face both Medicaid benefits cuts and ADA violations.

7 **a. Lillie Brantley**

8 Ms. Brantley would be irreparable harmed by a reduction in ADHC services to 3 days per
9 week. (Steinke Decl. ¶ 22.) Although Ms. Brantley is severely impaired by Alzheimer's disease,
10 ADHC services 5 days per week enable her to live in a familiar environment with family members
11 who care for her and whom she recognizes and can interact with. She can go out to eat with family,
12 and attend church. (McLorin Decl. ¶¶ 17, 18.) However, because she is unable to be left alone for
13 any period of time, she would be at risk of serious injury if she were home alone during the time that
14 ADHC is no longer available. (*Id.* at ¶ 6.) Given her family's inability to stay at home with her for
15 the days she would no longer be able to go to ADHC, she would need to be placed in a nursing
16 facility. Given her cognitive condition, she would likely deteriorate rapidly in an unfamiliar
17 environment such as a nursing facility. (Steinke Decl. ¶ 22.) Placement in an institution would be
18 devastating to her and to her family. (*Id.* at ¶ 22; McLorin Decl. ¶ 17.)

19 **b. Allie Jo Woodard**

20 Plaintiff Allie Jo Woodard would be irreparably harmed by a reduction in ADHC to 3 days
21 per week. Ms. Woodward lives in her own home with family alternating caring for her. Given her
22 complex medical and mental health conditions, Ms. Woodard cannot be left alone safely. There
23 would be no one to care for her on the days that she would no longer be able to attend ADHC. Ms.
24 Woodward relies on ADHC services for pain and medication management, and socialization to assist
25 her mental health condition. Without 5 days per week of ADHC, Ms. Woodward would need to be
26 placed in a nursing facility. Most likely, she would deteriorate physically and mentally. (Steinke
27 Decl. ¶ 24; Davis Decl. ¶ 25; Gaspard-Berry Decl. ¶ 16-17.)

28 **c. Gilda Garcia**

Ms. Garcia would be irreparably harmed by a reduction in ADHC to 3 days per week. Ms.

1 Garcia has unstable diabetes such that the frequent medical monitoring by ADHC nursing cannot be
 2 replicated by primary care. Ms. Garcia relies on ADHC for medical stabilization. In addition, Ms.
 3 Garcia is protected from isolation and depression by attending ADHC 5 days per week. If she had to
 4 remain at home for part of the week, she would likely see a rapid decrease in her mental and physical
 5 states, which would likely result in acute hospitalization and institutionalization. (Steinke Decl. ¶
 6 23; McCloud Decl. ¶¶ 26-27; Garcia Decl. ¶ 18; Perelman Decl. ¶ 14-15.)

7 **d. Class Members**

8 Plaintiffs' situations are typical of thousands of individuals who receive ADHC services, all
 9 of whom face imminent harm if the ADHC cuts are enacted. There are approximately 36,860
 10 recipients of ADHC services; approximately 8,121 of them currently receive services 4 and 5 day a
 11 week and will be affected by these cuts. (Missaelides Decl. ¶¶ 27, 33.) The following examples
 12 show the severe harm similarly situated individuals will suffer:

13 Chuck Peterson, 61, of Woodland, who has Chronic Obstructive Pulmonary Disease
 14 (COPD), emphysema, depression, anxiety, a hearing impairment, and is legally blind, among other
 15 disabilities. Mr. Peterson is oxygen dependent and takes approximately 15 medications. He has
 16 coughing episodes due to COPD, which cause him to black out and fall to the ground. As a result,
 17 he uses a wheelchair. He lives alone in an SRO and requires assistance with taking his medication
 18 and is dependent upon others for meals, transportation, personal assistance, chores, and shopping.
 19 (Peterson Decl. ¶ 3.) He attends the Yolo Adult Day Health Center 5 days a week, and fears
 20 institutionalization if he is only able to attend the program 3 days per week. (Peterson Decl. ¶ 9; *see*
 21 *also*, Myers Purkey Decl. ¶ 23 (stating that Mr. Peterson is a "high risk" for institutionalization).)

22 Wilrene LaMar, 57, of Oroville, who has multiple disabilities as a result of a cerebral
 23 vascular accident (CVA), and attends the Peg Taylor Center in Chico California 5 days per week.
 24 Ms Lamar receives daily nursing services to monitor her and to assess for signs of stroke, medication
 25 side effects, stomach problems and other serious health concerns. She fears she will be
 26 institutionalized in a nursing facility if ADHC services are cut. (LaMar Decl. ¶ 9.)

27 Ilene McKray, 70, of Orland, has schizoaffective disorder and diabetes. She had her left leg
 28 amputated. She lives in an assisted living facility, and is dependent on ADHC 5 days a week to

1 avoid nursing facility institutionalization. She receives daily physical therapy services to assist her
2 with using her prosthetic leg. Ms. McKray's sister believes she will suffer both physical and
3 emotional harm if her ADHC services are cut to only 3 days per week. (Simmons Decl. ¶¶ 8, 10.)

4 In addition to these individual participants, ADHC program providers have identified
5 participants who they believe will be harmed by these cuts:

6 Catherine Davis, Program Director of the Bayview Hunter's Point Adult Day Health Care
7 program: Of the participants in her Program, Ms. Davis and her staff have identified 22 individuals
8 who they believe are most at risk of institutionalization and/or physical harm should their ADHC
9 services be cut and they not receive replacement services. These individuals have been determined
10 to have a high potential for the deterioration of their medical, cognitive, or mental health condition
11 or conditions in a manner likely to result in emergency department visits, hospitalization, or other
12 institutionalization if ADHC services are not provided. (Davis Decl., ¶¶ 18, 33-36, Exh. A.)

13 Marina Krupnik, Executive Director of the Circle of Friends Adult Day Health Care Center
14 in San Francisco, CA.: Ms. Krupnik has identified 160 participants who receive ADHC services
15 four and 5 days a week. Based on her knowledge and experience, and the rules of the ADHC
16 program which require individuals to be at a high risk of institutionalization without the provision of
17 ADHC services every day of the week they currently receive ADHC services, Ms. Krupnik believes
18 that reductions to ADHC services from 5 to 3 days per week will cause individuals in her programs
19 to be institutionalized, hospitalized, or otherwise harmed. (Krupnik Decl. ¶ 18.)

20 Diane Puckett, Executive Director of Innovative Health Care Services and Administrator of
21 the Peg Taylor Center for Adult Day Health Care, Chico: Ms. Puckett has identified twenty-eight
22 participants in her program who receive services four and 5 days per week, who face the risk of
23 institutionalization, hospitalization or even death as a result of the reduction to their services.
24 (Puckett Decl. ¶¶ 14, 20, 23.)

25 Debbie Toth, Executive Director of the Mt. Diablo Center for Adult Day Health Care in
26 Pleasant Hill: Ms. Toth has identified 28 participants in her program who receive services four and
27 5 days per week, who face the risk of institutionalization as a result of the reduction to their services.
28 (Toth Decl. ¶ 17.)

1 **2. Plaintiffs are Likely to Succeed on the Merits of their Claims that**
 2 **Defendants are Violating the ADA and Section 504.**

3 **a. The ADA and Section 504 Prohibit Discrimination Against**
 4 **Individuals with Disabilities.**

5 In 1990, Congress enacted the Americans with Disabilities Act, as amended by the ADA of
 6 2008 (ADA) in 1990, to prohibit discrimination by all public entities. 42 U.S.C. §§ 12101(2008);
 7 H.R. Rep. No. 101-485, pt. 3, at 49 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 472.

8 Title II of the ADA, which governs public programs such as Medi-Cal, provides:

9 [N]o qualified individual with a disability shall, by reason of such
 10 disability, be excluded from participation in or be denied the benefits
 11 of the services, programs, or activities of a public entity, or be
 12 subjected to discrimination by any such entity.

13 42 U.S.C. § 12132.

14 Under the ADA, a “qualified individual with a disability” is a person who “with or without
 15 reasonable modifications to rules, policies or practices” meets the “essential eligibility requirements
 16 for the receipt of services or the participation in programs or activities provided by a public entity.”
 17 42 U.S.C. § 12131. Section 504’s definition is substantially similar. *See* 29 U.S.C. § 705(20).
 18 Plaintiffs are eligible for Medicaid and are qualified persons with disabilities within the meaning of
 19 the ADA and Section 504.⁵ (McCloud Dec. ¶¶ 19 – 21 (regarding Plaintiff Garcia); Garcia Dec. ¶ 3;
 20 Davis Dec. ¶¶ 21-22 (regarding Plaintiff Woodard)); ¶¶ 26-28 (regarding Plaintiff Brantley).)

21 Public entities must make reasonable modifications in “policies, practices, or procedures”
 22 when the modifications are necessary to avoid discrimination, unless the accommodation would
 23 fundamentally alter the nature of the program. 28 C.F.R. § 35.130(b)(7) (1991). Section 504 also
 24 requires publicly-funded programs to provide reasonable accommodations when needed to assure
 25 that people with disabilities have meaningful access to its programs and services. 29 U.S.C. §
 26 794(a); *see also Southeastern Community College v. Davis*, 442 U.S. 397, 410 (1979).

27 ⁵ ADA regulations define disabilities, with respect to an individual, to include “a physical or mental
 28 impairment that substantially limits one or more of the major life activities of such individual... such
 as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing,
 learning, and working.” 28 C.F.R. § 35.104 (1991). The Section 504 requirements are essentially
 the same. 28 C.F.R. § 41.32 (1981).

1 **b. The Cuts will Violate ADA and Section 504 Prohibitions Against**
2 **Unjustified and Unnecessary Institutionalization.**

3 In enacting the ADA, Congress specifically found that segregation of persons with
4 disabilities, especially in institutions, is a form of discrimination prohibited under the Act. 42 U.S.C.
5 §§ 12101(a)(2), (3), (5). Moreover, the Supreme Court has held that unjustified isolation is properly
6 regarded as discrimination based on disability under the ADA. *Olmstead*, 527 U.S. at 597.
7 Institutional confinement “severely diminishes the everyday life activities of individuals, including
8 family relations, social contacts, work options, economic independence, educational advancement,
9 and cultural enrichment.” *Id.* Section 504’s ban on disability discrimination also encompasses
10 unjustified institutionalization. *See, e.g., Frederick L. v. Dep’t of Public Welfare*, 157 F. Supp. 2d
11 509, 538 (E.D. Pa. 2001).

12 The ADA and Section 504 specifically mandate that individuals with disabilities be
13 integrated into the community to the greatest extent possible. The ADA requires public entities to
14 “administer services, programs and activities in the most integrated setting appropriate to the needs
15 of qualified individuals with disabilities.” 28 C.F.R. § 35.130(d). Similarly, under Section 504,
16 agencies receiving federal financial assistance must administer their programs and activities “in the
17 most integrated setting appropriate to the needs of qualified handicapped persons.” 28 C.F.R.
18 §41.51(d). These obligations, known as the “integration mandate,” are construed and applied in the
19 same manner. *Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175, 1179 n.3 (10th Cir.
20 2003).

21 The integration mandate was analyzed and interpreted by the United States Supreme Court in
22 the landmark decision *Olmstead v. L.C.*, 527 U.S. 581 (1999). The *Olmstead* plaintiffs were
23 individuals with mental disabilities who were confined in Georgia’s state psychiatric institutions but
24 who wanted to live in the community. Plaintiffs asserted that the state’s refusal to pay for services
25 that would enable them to live in community settings violated the integration mandate of Title II of
26 the ADA and its implementing regulations. The Court agreed, and held that “unjustified isolation is
27 properly regarded as discrimination based on disability.” *Id* at 597.

28 The high Court interpreted the ADA’s “integration mandate” as requiring persons with

1 disabilities to be served in the community when: 1) the state's treatment professionals have
 2 determined that community placement is appropriate; 2) community placement is not opposed by the
 3 affected individual; and 3) the placement can be reasonably accommodated, taking into account the
 4 resources available to the state and the needs of others with disabilities. *Id.* at 587.

5 Plaintiffs do not need to wait until they are institutionalized to bring a claim under the
 6 integration mandate. Individuals at risk of placement in nursing homes are also protected. *See*
 7 *Fisher*, 335 F.3d at 1181 (“...*Olmstead* does not imply that disabled persons who, by reason of a
 8 change in state policy, stand imperiled with segregation, may not bring a challenge to that state
 9 policy under the ADA’s integration regulation without first submitting to institutionalization.”)

10 Defendants are violating Plaintiffs’ rights to receive Medi-Cal services in the most integrated
 11 setting appropriate. Each Plaintiff meets all of the criteria necessary to show that the community
 12 integration mandate has been violated. *See Olmstead*, 527 U.S. at 587; *Radaszewski v. Maram*, 383
 13 F.3d 599, 608 (7th Cir. 2004).

14
 15 **1) The State’s Treatment Professionals Have Determined
 That Community Placement is Appropriate.**

16 Defendants have determined that receiving Medi-Cal services in the community is
 17 appropriate to meet Plaintiffs’ needs. All Plaintiffs currently live in the community where they have
 18 been receiving Medi-Cal services, many for years. (McCloud Decl. ¶¶ 19-20 (regarding Plaintiff
 19 Garcia); Davis Decl. ¶¶ 20-21 (regarding Plaintiff Woodard); and ¶¶ 26-27 (regarding Plaintiff
 20 Brantley).) They all have Individual Plans of Care (IPC), developed by a multi-disciplinary team
 21 which sets forth services needed for them to remain safely in the community. These IPCs have been
 22 submitted and approved by Medi-Cal. (McCloud Decl. ¶ 19; Davis Decl. ¶¶ 20 and 26.) As a
 23 requirement of the program, Plaintiffs have been determined to have a “high potential for the
 24 deterioration of their medical, cognitive, or mental health condition or conditions in a manner likely
 25 to result in emergency department visits, hospitalization, or other institutionalization if ADHC
 26 services are not provided.” (McCloud Decl. ¶¶ 17, 19, and 29; Exh. B; Davis Decl. ¶¶ 18, 20 and 26,
 27 Exh. B, C.) Moreover, Plaintiffs’ treating providers and Plaintiffs’ medical expert have specifically
 28 opined that community-based ADHC is the appropriate option, and institutionalizing them in nursing

1 homes will be dangerous to their health and lives. (Steinke Decl. ¶¶ 21-24; McCloud Decl. ¶¶ 20-
2 26; Davis Decl. ¶¶ 24-25, 27-32.)

3 **2) Plaintiffs Want to Stay in the Community.**

4 Far from opposing community placement, these Plaintiffs are fighting to remain in their
5 homes. (Garcia Decl. ¶¶ 4, 7, 16-17; McLorin Decl. ¶¶ 8-9, 16-17 (regarding Plaintiff Brantley);
6 Gaspard-Berry Decl. ¶ 17 (regarding Plaintiff Woodard).) As a result of Defendants' cuts, however,
7 the only way Plaintiffs can receive the services they need is to move to a nursing home or risk
8 hospitalization. (Steinke Decl. ¶¶ 21-24; McCloud Decl. ¶ 29; Davis Decl. ¶¶ 24-25, 31-32.)

9 **3) Defendants can Reasonably Accommodate Plaintiffs'
10 Desire to Receive Services in the Community.**

11 Under *Olmstead*, the integration mandate requires that Plaintiffs receive Medi-Cal services in
12 the community when this desire can be reasonably accommodated, taking into account the resources
13 available to the state and the needs of others with disabilities. *Olmstead*, 527. Defendants can
14 accommodate Plaintiffs' needs because the necessary services are available not only through the
15 ADHC program, but also are covered separately by Medi-Cal. ADHC services enable Plaintiffs to
16 be supported in the community by providing cost-effective community-based care.⁶ However, under
17 California's Medi-Cal program, there are a range of alternative community services that could be
18 used to replace the ADHC services that are being cut, including nursing, personal care, therapy, case
19 management, medication, meals, and transportation. *See*, "Comparison of Services and Programs
20 chart." (Zirker Decl., Exh. A.)

21 Plaintiffs need information, assistance and time to secure those alternative community-based
22 services prior to termination of ADHC services. Defendants have failed to take any steps to identify
23 and ensure provision of these services to Plaintiffs and Class Members. Cuts should be stopped until
24 Defendants meet their obligations, under *Olmstead*, to ensure access to alternative services, available
25 under the Medi-Cal program, which are needed to avoid institutionalization in hospitals and nursing

26 ⁶ ADHC services were specifically designed to "ensure that elderly persons and adults with
27 disabilities are not institutionalized inappropriately or prematurely," recognizing that overreliance on
28 nursing facilities and institutions has proven to be a "costly panacea in both financial and human
terms, often traumatic, and destructive of continuing family relationships and the capacity for
independent living." Cal. Health & Safety Code § 1570.2.

1 facilities.

2 Moreover, for those Plaintiffs for whom alternative services cannot be located, and
3 continuance of ADHC for 4 or 5 days is necessary to prevent institutionalization, ADHC services
4 should be available 4 or 5 days as a reasonable modification to the Medi-Cal program. In fact, under
5 ABX4 5, once Defendant Maxwell-Jolly issues a declaration implementing new eligibility
6 restrictions, the temporary ban on 4 or 5 days of ADHC will be lifted altogether. It is not only
7 reasonable, but prudent, to permit up to 5 days per week in the interim when necessary.

8 Defendants' rush to cut ADHC services, paired with the complete failure to provide notice,
9 give participants information on or arrange for replacement services, or take any steps to prevent the
10 unnecessary institutionalization of Plaintiffs is culpable, and violates both the ADA and Section 504.

11 Case law is instructive here. In *Fisher*, the state imposed a rule limiting Medicaid coverage
12 of prescription drugs to only 5 prescriptions per month for individuals in the community. 335 F.3d
13 at 1178. If Medicaid beneficiaries required more than 5 prescriptions, they had to move into nursing
14 homes, where prescriptions were unlimited. *Id.* Plaintiffs requested an accommodation that would
15 enable them to obtain prescriptions in excess of the cap while still in their homes. The Tenth Circuit
16 reversed a grant of summary judgment in defendants' favor and held that the cap on prescriptions
17 could violate the ADA's integration mandate. *Id.* The circuit court rejected the district court's
18 holding that fiscal burdens associated with reasonable accommodations would necessarily require a
19 fundamental alteration, stating:

20 [It is not] clear why the preservation of a program as it has existed for
21 years . . . would fundamentally alter the nature of the program. . . .
22 Plaintiffs are simply asking that a service for which they would be
23 eligible under an existing state program . . . be provided in a
24 community-based setting rather than a nursing home. . . .

25 *Id.* at 1183. The court observed that "Congress was clearly aware that 'while the integration of
26 people with disabilities will sometimes involve substantial short term burdens, financial and
27 administrative, the long range effects will benefit society as a whole.'" *Id.*, quoting H.R. Rep. No.
28 101-485, pt. 3, at 50, reprinted in 1990 U.S.C.C.A.N. 445, 473. Moreover, the court questioned
whether the required accommodation would constitute a fiscal burden at all. In response to the
lower court's suggestion that having to provide prescriptions in excess of the cap would force them
to eliminate the home based program all together, the court observed that:

1 [g]iven that the cost of institutional care is nearly twice that of
2 community based care, it seems unlikely that . . . elimination of the
3 waiver program, would have solved Oklahoma's fiscal crisis, because
4 it could have served only to drive participants into nursing homes.

5 *Id.* at 1183.

6 The situation in California is similar. Plaintiffs request only that Defendants ensure that
7 Plaintiffs have coverage for Medi-Cal replacement services, or, in cases where that is not possible,
8 continue to provide a cost-effective community alternative to institutional care -- ADHC services 4
9 or 5 days per week. Missaelides Decl ¶¶ 28, 38.

10 In *Townsend v. Quasim*, 328 F.3d 511 (9th Cir. 2003) the plaintiff was a "categorically
11 needy" Medicaid recipient who lived in a community setting with Home and Community-Based
12 Services (HCBS) Waiver services. When his income increased slightly, he became ineligible for
13 HCBS Waiver services; thus, Mr. Townsend and those similarly situated would be forced to receive
14 long-term care services in nursing homes. The district court granted summary judgment in favor of
15 the State on the basis that the plaintiffs were requesting "new" services which were not required by
16 *Olmstead*. The Ninth Circuit reversed, concluding that the services sought by plaintiffs were not
17 new, as they were already provided in a nursing home setting and requiring the State to demonstrate
18 that providing community-based services to medically needy individuals would compel cutbacks in
19 services to other Medicaid recipients. As the Court pointed out: "[W]here the issue is the location
20 of services, not *whether* services will be provided, *Olmstead* controls." *Id.* at 517.

21 *See also, Radaszewski*, 383 F.3d 600 at 611. (Seventh Circuit reversed the district court,
22 holding that "[t]he integration mandate may well require the state to make reasonable modifications
23 to the form of existing services in order to adapt them to community-integrated settings" and
24 remanded the case for further findings.) On remand, *Radaszewski*, No. 01-C 9551, 2008 WL
25 2097382 (N.D. Ill. 2008) (Plaintiffs' nursing needs could be accommodated by providing additional
26 hours above the cap or modifying other Medicaid programs to meet Plaintiffs' needs.)
27 ******Crabtree v. Goetz*, 3:08-939, 2008 WL 5330506 (M.D. Tenn. Dec. 19, 2008) (Memorandum);
28 (enjoining state agency from reducing plaintiffs' home health aide and nursing services, which would
place them at risk of institutionalization, until individualized assessments could be made of their
specific needs for services).

As in *Townsend* and *Radaszewski*, Plaintiffs have already been determined to need the type

1 of services available under the ADHC Medi-Cal program. Plaintiffs' Individual Plans of Care, and
 2 the services set forth therein, have been authorized by Defendants as "medically necessary" to avoid
 3 a "high potential" for health risks and deterioration "likely to result in emergency department visits,
 4 hospitalization, or other institutionalization" without ADHC services. (Davis Decl. ¶¶ 24 and 31;
 5 McCloud Decl. ¶ 25.) Their care needs and health require services that could be provided in their
 6 homes, or, although undesirable, at an institution. (Davis Decl. ¶¶ 23, 30.) There is no dispute about
 7 eligibility or need for services, just where these services must be provided. The ADA answers that
 8 question. Plaintiffs should receive services at home, in the community with their families, where
 9 they desire to be.

10 As in *Fisher, Radaszewski, Townsend, and Crabtree*, Plaintiffs are not asking that a new
 11 program be created, nor do they ask Defendants to fund a service that it otherwise would not fund in
 12 an institutional setting. They simply ask that they continue to receive services in the community
 13 instead of in a nursing home. There are numerous ways that Defendants can deliver these services.
 14 Accordingly, Plaintiffs are likely to succeed on the merits of this claim.

15 **c. Defendants are Violating the Prohibition on Employing Methods of
 Administration that Result in Discrimination.**

16 The ADA prohibits methods of administration or contractual arrangements which, though
 17 neutral on their face, have a discriminatory effect. A public entity may not:

18 directly or through contractual or other arrangements, utilize ...
 19 methods of administration (i) [t]hat have the effect of subjecting
 20 qualified individuals with a disability to discrimination on the basis of
 21 disability; [and](ii) [t]hat have the purpose or effect of defeating or
 22 substantially impairing accomplishment of the objectives of the public
 23 entity's program with respect to individuals with disability.

24 28 C.F.R. § 35.130 (b)(3). Section 504 contains similar requirements. *See* 28 C.F.R.
 25 § 41.51(b)(3)(i); 45 C.F.R. § 84.4(b)(4) (2005).

26 Defendants' actions violate the methods of administration provision of the ADA and Section
 27 504 by denying Plaintiffs access to community-based Medi-Cal services and by subjecting them to
 28 unnecessary institutionalization in hospitals and nursing facilities, as follows:

1. by cutting Medi-Cal ADHC services before providing notice and an opportunity for a hearing, which would enable Plaintiffs and other beneficiaries to seek secure community-based replacement services;
2. by failing to provide information about alternative community-based services

1 under the Medi-Cal program, which are available to Plaintiffs and other beneficiaries in order to
2 avoid hospitalization or placement in an institution;

3 3. by failing to provide enough time for Plaintiffs and other beneficiaries to
4 actually secure replacement community services prior to termination of current ADHC services;

5 4. by forcing Plaintiffs and other beneficiaries to be institutionalized pending the
6 issuance of the Director's declaration reinstating ADHC services to up to 5 days per week;

7 5. by imposing ADHC cuts without regard to the individual needs of Plaintiffs
8 and other beneficiaries;

9 6. by providing no system by which Plaintiffs and beneficiaries may obtain
10 exceptions to the caps on services;

11 7. by failing to provide reasonable modification exceptions, including the
12 provision of ADHC services 4 – 5 days per week, as required to avoid unnecessary
13 institutionalization of Plaintiffs and other beneficiaries; and,

14 8. by forcing doctors and other providers into reducing levels of services
15 contrary to the documented medical needs of Plaintiffs and other beneficiaries, placing them at risk
16 of institutionalization, physical harm or death.

17 Further, Defendants' actions and inactions defeat or substantially impair the very purpose of
18 the ADHC Medi-Cal program which is to "provide a viable alternative" and "ensure that elderly
19 persons and adults with disabilities are not institutionalized in appropriately or prematurely." Cal.
20 Health & Safety Code § 1570.7(a),(b) (West 2009). Defendants' methods of administration
21 undermine these goals and must be judged in that light. Plaintiffs have shown a likelihood of
22 success on this claim.

23 **3. Plaintiffs are Likely to Succeed on the Merits of their Claims that**
24 **Defendants are Violating the Due Process Clause of the Fourteenth**
25 **Amendment and Medicaid Law by Failing to Provide Adequate Pre-**
26 **termination Notice and Opportunity for a Hearing.**

27 Defendants have failed to provide adequate pre-termination notice and opportunity for a
28 hearing, in violation of the Due Process Clause of the Fourteenth Amendment and the federal
Medicaid statute and regulations. The Fourteenth Amendment to the U.S. Constitution prohibits a
state from depriving any person of property without due process of law. U.S. Const. amend XIV,
§ 1. Moreover, it is well established that Medicaid recipients have a statutory entitlement to benefits
that is protected by the Due Process Clause of the Fourteenth Amendment. *See, e.g., O'Bannon v.*
Town Court Nursing Center, 447 U.S. 773, 787 (1980) (Medicaid recipient has right protected by
due process to continued Medicaid benefits to pay for services from the qualified provider of his
choice). In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Court noted that termination of public
benefits "pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the

1 very means by which to live while he waits.” *Goldberg v. Kelly*, 397 U.S. at 264 (emphasis in
 2 original). Thus, the Court held that such individuals (which include Plaintiffs in this case) are
 3 entitled, under due process, to an evidentiary hearing *before* benefits can be discontinued.

4 According to the Court, such recipients must also be given an “opportunity to be heard . . . at a
 5 meaningful time and in a meaningful manner.” *Goldberg*, 397 at 267.

6 Further, the federal Medicaid statute and regulations require that a state provide notice and an
 7 opportunity for an administrative hearing before it terminates eligibility or authorization for services.

8 42 U.S.C. § 1396a(a)(3); 42 C.F.R. §§ 431.220. The regulations require that, at the time of any
 9 action affecting an individual’s claim to services, an individual must receive written notice of: (1)
 10 the right to a hearing; (2) the method by which she may obtain a hearing; and (3) that she may
 11 represent herself or be represented by another. 42 C.F.R. § 431.210. The notice must contain:

- 12 (a) a statement of what action the State . . . intends to take;
- 13 (b) the reasons for the intended action;
- 14 (c) the specific regulations that support, or the change in Federal or State law that requires, the
 15 action;
- 16 (d) an explanation of: (1) the individual’s right to request an evidentiary hearing if one is
 available, or a state agency hearing; or (2) In cases of an action based on a change in law, the
 circumstances under which a hearing will be granted; and
- (e) An explanation of the circumstances under which Medicaid is continued if a hearing is
 requested.

17 *Id.* This notice must be mailed at least 10 days before the date of the action. 42 C.F.R. § 431.211:
 18 Cal. Code of Regs. Tit. 22 §§ 50179(d), 51014.1(c). In addition, if a hearing is requested within 10
 19 days, benefits must continue until the agency reaches a final decision. 42 C.F.R. § 431.230 (a).

20 Defendants have failed to provide Plaintiffs and other affected ADHC recipients with notice
 21 which includes their right to a hearing. (McLorin Decl., ¶ 15; Gaspard-Berry Decl., ¶ 14; Garcia
 22 Decl. ¶ 17.) Nowhere in the web notice does it state that ADHC recipients may be entitled to
 23 services under other Medi-Cal benefit programs, nor does the notice advise Plaintiffs of their right to
 24 a fair hearing, the manner for requesting a hearing, their right to a continuation of benefits pending a
 25 hearing, or whether components of their existing services or other similar other services may be
 26 available to meet Plaintiffs’ needs which are established in their currently-authorized TARs.
 27 (Puckett Decl. ¶ 17, Exh. B.)

28 Furthermore, Plaintiffs are entitled to not only notification of the cut, but also to a pre-

1 termination hearing. In the case of the named Plaintiffs and other class members, there are other
 2 issues that could be addressed at a hearing, including whether they continue to be entitled to skilled
 3 nursing services, personal care services, and other Medi-Cal services independent of the ADHC
 4 benefit. At the very least, Plaintiffs should be granted hearings to determine whether there are other
 5 contested issues other than the change in law reducing the ADHC benefit. 42 C.F.R. § 431.230(a)(1)
 6 (1980) (providing that, if a hearing is requested within 10 days, benefits must continue pending a
 7 determination of whether the sole contested issue is one of federal or state law.)

8 Defendants have not met their procedural due process obligations under the Medicaid law, or
 9 the Constitution's due process clause. Accordingly, Plaintiffs have a strong likelihood of success on
 10 these claims.

11 **4. The Balance of Equities is in Plaintiffs' Favor**

12 The balance of hardships tips sharply towards Plaintiffs. They stand to lose vital services at
 13 risk to their health and lives. They are also at risk of institutionalization and its attendant loss of
 14 independence and separation from family and community. In contrast, Defendants will suffer no
 15 harm because the injunction will only require them to continue providing services in exactly the
 16 same manner that it has done for years. Moreover, if the injunction is *not* granted, they would be
 17 required to provide the same services in costly nursing homes, which is likely to be more expensive.

18 In any case, the expense incurred by providing benefits does not outweigh harm to plaintiffs.
 19 *See Daniels v. Wadley*, 926 F. Supp. 1305 at 1313 (M.D. Tenn. 1996); *Kansas Hosp. Ass'n v.*
 20 *Whiteman*, 835 F. Supp. 1548, 1552-1553 (D. Kan. 1993) (concluding that the threatened injuries to
 21 the plaintiffs outweighed any harm to the defendant because changing Medicaid coverage
 22 "significantly alters the status quo to the detriment of the individual plaintiffs, while its positive
 23 budgetary impact on state coffers is negligible in a relative sense").

24 In this case, it is extremely unlikely the state will realize any significant savings. Without
 25 ADHC services, Plaintiffs and class members will face deteriorating, and ultimately acute, medical
 26 conditions. They will be forced into expensive nursing homes where most of them are at risk of
 27 deterioration and likely to require even more costly hospital admissions.

28 Finally, the Defendant cannot be harmed by complying with what the federal law requires:

Because the defendants are required to comply with the [law in
 question], we do not see how enforcing compliance imposes any

1 burden on them. The Act itself imposes the burden; this injunction
2 merely seeks to prevent the defendants from shirking their
 responsibilities under it.

3 *Haskins v. Stanton*, 794 F.2d 1273, 1277 (7th Cir. 1986) (granting preliminary injunction requiring
4 defendant's compliance with federal Food Stamp law).

5 **5. An Injunction is in the Public's Interest**

6 The public interest will be served by granting an injunction. The ADA and Section 504 are
7 based on strong public policy concerns. Congress enacted the ADA to build upon the guarantees of
8 Section 504 and to address the "serious and pervasive" social problem caused by discrimination
9 against people with disabilities and to provide a clear and comprehensive national mandate for
10 elimination of discrimination against individuals with disabilities. 42 U.S.C. § 12101. It serves the
11 public interest to carry out the mandates of these laws. *See also Heather K. v. Mallard*, 887 F. Supp.
12 1249, 1263, 1266 (N.D. Iowa 1995) (issuing temporary restraining order, holding that Americans
13 with Disabilities Act embodied the public interest in enforcement of anti-discrimination provisions
14 against public officials); *U.S. v. Edward Rose & Sons*, 384 F.3d 258 (6th Cir. 2004) (holding that
15 enforcing the Federal Housing Act serves the public interest); *Glenwood Bridge, Inc. v. Minneapolis*,
16 940 F.2d 367, 372 (8th Cir. 1991) (enforcement of the federal law is in the public interest.)

17 **IV. CLASSWIDE RELIEF IS APPROPRIATE**

18 Plaintiffs have moved simultaneously with this motion for certification of a class of ADHC
19 beneficiaries and a subclass of ADHC beneficiaries immediately affected by the 5 to 3 day
20 reduction, since all members of the class and subclass face irreparable harm. Fed. R. Civ.P. 23(c)(1)
21 provides that "as soon as practicable after the commencement of an action brought as a class action,
22 the court shall determine..." whether it is to be so maintained. Classwide relief for the class and
23 subclass is appropriate at the preliminary injunction stage. If the motion for class certification
24 cannot be held simultaneously, class wide injunctive relief can still be granted." "[W]hen the
25 determination of the class action issues is delayed, a suit brought under Rule 23 should be treated as
26 a class action . . . until there is a determination that the action may not proceed under the rule." *N.Y.*
27 *State Nat'l. Org. for Women v. Terry*, 697 F. Supp. 1324, 1336 (S.D. N.Y. 1988), citing to 7B
28 Wright, Miller & Kane, Fed. Practice & Proc. § 1785 (1986); *Joyce v. City & County of San*

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