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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF LOS ANGELES – CENTRAL DISTRICT

11 PATRICK KELLEY and MATTHEW
12 REED, by and through his guardian ad
item, VICKI REED,

13 Petitioners/Plaintiffs,

14 v.

15 JENNIFER KENT, in her official capacity
16 as Director of the California Department of
Health Care Services and the
17 CALIFORNIA DEPARTMENT OF
HEALTH CARE SERVICES;
18 KIMBERLEY JOHNSON, in her official
capacity as the Director of the California
19 Department of Social Services; and the
CALIFORNIA DEPARTMENT OF
20 SOCIAL SERVICES,

21 Respondents/Defendants.

CASE NO. BS170173

(Assigned to Hon. James C. Chalfant)

**PETITIONERS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF THEIR PETITION FOR
WRIT OF ADMINISTRATIVE
MANDAMUS AND WRIT OF MANDATE
(CODE CIV. PROC. §§ 1094.5 AND 1085)**

[COMPENDIUM OF SUPPORTING
EVIDENCE AND REQUEST FOR JUDICIAL
NOTICE FILED CONCURRENTLY
HEREWITH]

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1 **I. INTRODUCTION**

2 The Affordable Care Act (“ACA”), enacted in 2010, expanded special Medicaid eligibility
3 rules for persons with disabilities allowing them to qualify for Medi-Cal and receive care in their
4 homes instead of being forced into institutions and impoverishing their spouses. This change in
5 Medi-Cal eligibility should have taken effect on January 1, 2014. However, respondent California
6 Department of Health Care Services (“DHCS”) did not even begin to roll out the new eligibility
7 rules until July 19, 2017 – 1,295 days late. As a result of DHCS’s patent and ongoing violations of
8 the ACA as well as other federal and state laws, thousands of individuals with disabilities statewide
9 have been denied correct Medi-Cal eligibility determinations and, by extension, access to Medi-
10 Cal covered benefits including home and community-based services.

11 Petitioners Kelley and Reed bring this action to compel DHCS to comply with its legal
12 duties to: (1) ensure individuals receive correct Medi-Cal eligibility determinations based on the
13 spousal impoverishment rule; (2) notify all potentially eligible beneficiaries of the new rule;
14 (3) establish a retroactive eligibility process for in-home supportive services (“IHSS”); and
15 (4) ensure payment or reimbursement for IHSS. Mr. Reed also seeks administrative mandamus to
16 reverse an administrative hearing decision by Respondent California Department of Social Services
17 (“CDSS”) that incorrectly denied his retroactive eligibility for IHSS.

18 **II. STATEMENT OF FACTS**

19 **A. The Spousal Impoverishment Methodology Under The ACA**

20 Married individuals with significant disabilities who need home and community-based
21 services are entitled to Medi-Cal eligibility determinations based on specialized eligibility rules
22 known as the spousal impoverishment methodology. 42 U.S.C. § 1396r-5(h)(1)(A)). In 2010, the
23 ACA expanded the definition of an “institutionalized spouse” to include individuals who require
24 an institutional level of care but can receive the necessary services through home and community-
25 based Medicaid programs. Pub. L. No. 111-148, § 2404 (2010) (amending 42 U.S.C. § 1396r-
26 5(h)(1)(A)). This change was enacted to allow married individuals to remain living at home and
27 avoid going into a nursing facility, without impoverishing their spouses. Ex. 23. The ACA gave
28 states four years to plan and implement this change, making the effective date January 1, 2014. *Id.*

1 The spousal impoverishment rule is an income and resource counting methodology to
2 determine Medi-Cal eligibility. It evaluates the income and resources of an “institutionalized
3 spouse” separately from their “community spouse.” 42 U.S.C. § 1396r-5(a)(1). The protection
4 increases the amount of income and resources a “community spouse” can keep while allowing the
5 “institutionalized spouse” to qualify for Medi-Cal benefits. *Id.* § 1396r-5. If a person’s income is
6 above a certain limit, they are assessed a “share of cost,” which functions like a monthly deductible.
7 *See* Welf. & Inst. Code § 14005.7. Medi-Cal will not pay for benefits until a beneficiary has met
8 their share of cost. *Id.* If a person’s resources exceed the limit, they are denied Medi-Cal altogether.

9 Once determined eligible for Medi-Cal, an institutionalized spouse has access to Medi-Cal
10 covered services, including IHSS. IHSS allows them to hire a caregiver to help with personal care
11 and other daily living activities. *See* Welf. & Inst. Code § 12300 *et seq.*; Ex. 6, ¶ 6. Family
12 members can be hired as IHSS caregivers and earn wages. *Id.* § 12300.4. Without access to IHSS,
13 many disabled individuals would not be able to live safely at home because they cannot afford the
14 care they need. *See* Ex. 1, ¶¶ 8-9; Ex. 13, ¶ 4. DHCS also administers several other Medi-Cal
15 programs to enable disabled individuals to remain safely at home, some of which have a waitlist.
16 Ex. 34. Prior to the ACA, DHCS only applied the spousal impoverishment rule to married
17 individuals who were enrolled in one of these programs, but since 2014, DHCS is required to apply
18 it to all waitlisted individuals. Ex. 24, p. 13. Despite this change, these individuals do not
19 consistently receive the benefit of the new rules. *See* Ex. 3, ¶ 7; Ex. 2, ¶ 10; Ex. 6, ¶¶ 8, 10.

20 **B. DHCS Has Failed To Ensure That All “Institutionalized Spouses” Are**
21 **Correctly Determined Eligible For The Medi-Cal Program**

22 As the “single State agency,” DHCS has ultimate responsibility for the Medi-Cal program,
23 including Medi-Cal benefits such as IHSS. 42 U.S.C. § 1396a(a)(5); 42 C.F.R. § 431.10; Welf. &
24 Inst. Code § 10740. DHCS has delegated administration of the IHSS program to Respondent
25 CDSS. Ex. 26, ¶ 14. However, DHCS remains responsible for ensuring that CDSS and all local
26 district offices that handle Medi-Cal cases comply with state and federal laws. 42 C.F.R. § 431.10.

27 Between January 1, 2014 and the filing of this petition on July 6, 2017, DHCS did nothing
28 to put the expanded protections in place. Ex. 24; Ex. 26, ¶ 73; Ex. 17, p. 52:11-22; Ex. 18, p. 35:5-

1 10. After Petitioners brought this lawsuit, DHCS released All County Welfare Directors Letter
2 (“ACWDL”) 17-25 to inform counties of the definitional change to “institutionalized spouse” and
3 explain what the change meant after three and a half years of non-compliance. Ex. 24. Soon after
4 its release, DHCS realized that its guidance was insufficient, as it did not provide counties with the
5 clarity and tools they needed. Ex. 17, p. 60:1-17; Ex. 18, p. 69:10-23; Ex. 22, p. 31:5-32:8, 56:11-
6 15 (listing deficiencies requiring further guidance); Ex. 31 (“DHCS understands that without this
7 guidance, the counties are unable to implement changes in the way they determine eligibility.”).

8 DHCS took *another year* to issue that supplemental guidance, ACWDL 18-19, in August
9 2018. Ex. 25; Ex. 17, p. 60:1-17. Even after ACWDL 18-19 was released, some counties took
10 months longer to introduce the expanded spousal impoverishment rule to their eligibility staff. *See*,
11 *e.g.*, Ex. 20, p. 50:11-16 (Tulare County did not release local guidance until October 2018); Ex. 21,
12 p. 44:5-9 (San Mateo County did not issue local guidance until November 2018).

13 Issuing two policy letters was not enough to correct years of inaction. To this day, Medi-
14 Cal applicants and beneficiaries experience frustration, delay, and ignorance about getting correct
15 eligibility determinations using the expanded spousal impoverishment rule. *See* Ex. 4, ¶¶ 7, 9-10;
16 Ex. 14, ¶ 11; Ex. 11, ¶¶ 4-5, 7-8; Ex. 16, ¶¶ 12-14. The problem persists statewide. *See* Ex. 9, ¶¶ 8,
17 12 (Contra Costa County); Ex. 11, ¶¶ 3, 5 (Orange County). One advocate alone has intervened in
18 20 cases spanning 10 counties. Ex. 14, ¶ 5. Another advocate worked for months to help their
19 client. *See* Ex. 9, ¶ 12 (“Only after nine months of extensive advocacy and independent research
20 on my and other advocates’ parts were the clients finally approved for no-share of cost Medi-Cal.”).

21 DHCS has also failed to notify the majority of potentially eligible individuals, issuing only
22 one outreach letter and only to a small subset of people. *See* Ex. 35; Ex. 24, p. 3-4. None of the
23 individuals who have been incorrectly denied or discontinued from Medi-Cal because of DHCS’s
24 flawed process has been notified that they may have received an incorrect eligibility determination.
25 Ex. 17, p. 81:1-11, 95:6-11; *see also* Ex. 20, p. 38:15-39:11. DHCS promised counties that it would
26 provide a list of potentially impacted beneficiaries, but it never did. Ex. 22, p. 52:15-18.
27 Furthermore, DHCS has not updated any of its public informational materials to reflect the
28 expansion of the spousal impoverishment rule. *See* Exs. 44, 46.

1 Because most people who would benefit from the expanded spousal impoverishment rule
2 have never even heard about it and many local Medi-Cal offices do not understand it, getting it
3 correctly applied in an individual case often requires advocate intervention. Ex. 4, ¶ 10; Ex. 9,
4 ¶ 13; Ex. 14, ¶ 8. Fighting to get the expanded spousal impoverishment rule applied in their clients’
5 cases is time and resource intensive for advocates. Ex. 4, ¶¶ 7, 16; Ex. 11, ¶ 5.

6 **C. Thousands Of Married Individuals Have Been Harmed By DHCS’s Inaction**

7 The delays and problems with making correct eligibility determinations places a heavy
8 burden on the people who should bear it the least. Ex. 2, ¶¶ 9, 19, 21, 23-24; Ex. 3, ¶¶ 6-8, 19-23;
9 Ex. 4, ¶¶ 7, 15; Ex. 14, ¶ 9; Ex. 9, ¶ 9-10. This harm is especially acute because Medi-Cal is the
10 main public program that pays for in-home care, and IHSS is the program providing that care.
11 Ex. 7, ¶¶ 3-4; Ex. 8, ¶¶ 3-4. Many families would not be able to keep their loved ones at home
12 without the critical care and income the IHSS program provides. *See* Ex. 6, ¶¶ 8, 10; Ex. 12, ¶ 10.

13 Fighting for years to get Medi-Cal benefits has been “incredibly stressful and demoralizing”
14 for Petitioner Kelley. Ex. 1, ¶ 10. It also has exacted a costly toll on his wife: “Watching Melody
15 fight for me and drain her strength has compounded my feelings of helplessness, a truly awful
16 position for a husband and former army man to find himself in.” *Id.* For their own part, community
17 spouses also experience intense emotional hardship. Ex. 6, ¶ 9; Ex. 15, ¶ 14; Ex. 16, ¶¶ 16-17;
18 Ex. 9, ¶¶ 9-10. For Petitioner Reed, his wife “struggled to juggle, work, life, and caregiving. The
19 stress was so great that in our darkest moments, we feared we would be forced to institutionalize
20 [Mr. Reed].” Ex. 2, ¶ 9. Because Medi-Cal eligibility must be re-determined yearly, families are
21 constantly at risk that the protections will be mistakenly taken away. Ex. 15, ¶ 12; Ex. 4, ¶¶ 14-15.

22 **D. Petitioner Kelley Was Harmed By DHCS’s Failure To Follow The Law**

23 Patrick Kelley is a married 69-year-old veteran who has primary progressive multiple
24 sclerosis. Ex. 1, ¶¶ 3-5; Ex. 3, ¶ 3. Because of his serious medical condition, Mr. Kelley is eligible
25 for home and community-based services at a nursing facility level of care. Ex. 1, ¶ 5; Ex. 3, ¶¶ 4-
26 5. His wife, Melody Rogers, who is 77-years old, spent a significant amount of the couple’s savings
27 and retirement funds paying for in home care while they waited for correct Medi-Cal eligibility and
28 IHSS determinations. Ex. 3, ¶¶ 6, 8, 12; Ex. 1, ¶ 8.

1 In 2014, Mr. Kelley applied for a waiver program that provides home and community-based
2 services. Ex. 3, ¶ 7. In September 2016, Mr. Kelley again applied for Medi-Cal because his family
3 was “almost completely out of money to pay for home care services.” *Id.* ¶ 9. In February 2017,
4 Mr. Kelley’s application was denied on the ground that he and his wife together had savings that
5 exceeded the Medi-Cal property limit of \$3,000. *Id.* ¶ 10. Los Angeles County did not apply the
6 spousal impoverishment methodology when processing either of his 2014 or 2016 applications. *Id.*
7 ¶¶ 8, 10. This took an enormous toll on Mr. Kelley and his wife, as “[they] were going broke at a
8 rate that would eventually force [Mr. Kelley] into a nursing facility.” *Id.* ¶ 11.

9 It took two separate administrative hearings and the help of an experienced advocate for
10 Mr. Kelley to obtain the benefit of the expanded spousal impoverishment rule. Ex. 3, ¶ 14. His
11 first hearing was to correct his Medi-Cal eligibility, which did not occur until a year after his
12 application. *Id.* It was not until a second hearing decision was issued in July 2018 that Mr. Kelley
13 was approved for retroactive IHSS eligibility and payment for his out of pocket expenses. *Id.* ¶ 17.

14 **E. Petitioner Reed Was Harmed By Respondents’ Failure To Follow The Law**

15 Matthew Reed is a married 63-year-old man who has been diagnosed with multiple
16 sclerosis, Bell’s Palsy, partial paralysis, and vascular dementia following a stroke. Reed
17 Administrative Record (“AR”) 000011. Because of his disabilities, Mr. Reed is eligible for home
18 and community-based services at a nursing facility level of care. Reed AR 000089.

19 In 2014, Mr. Reed was found eligible for Medi-Cal with a high monthly share of cost. Reed
20 AR 000136: 5-13. He also applied for and was approved for IHSS, but because his share of cost
21 was so high, he could not afford to use it. *Id.* In July 2016, Mr. Reed applied for a waiver program
22 that provides home and community-based services. Reed AR 000011, 125:21-22. In August 2016,
23 he again applied for Medi-Cal, but Los Angeles County failed to apply the spousal impoverishment
24 rule. As a result, his monthly share of cost was determined to be \$1,509, nearly 30% of his monthly
25 income. Reed AR 000014. This amount was so high, he could not afford to use his Medi-Cal
26 benefits, so did not apply for IHSS, which he desperately needed. Reed AR 000136:5-13, 121:16-
27 24.

28 Mr. Reed appealed and then conditionally withdrew his appeal because Los Angeles County

1 agreed to use the spousal improvement methodology to re-determine his Medi-Cal eligibility back
2 to July 2016, when he applied for the waiver, and to reimburse him for retroactive IHSS contingent
3 on approval of his Medi-Cal eligibility. Reed AR 000015-16.

4 In September 2017, Los Angeles County informed Mr. Reed that it was unable to process
5 retroactive IHSS payments because there was no IHSS application between the termination of IHSS
6 in 2014 and his subsequent application in May 2017. Reed AR 000023. Mr. Reed appealed,
7 arguing that his IHSS application and eligibility should both be retroactive to July 2016, the date
8 of his Medi-Cal eligibility, based on equitable estoppel. Reed AR 000005-09. The Administrative
9 Law Judge (“ALJ”) rejected the equitable estoppel argument and upheld the denial of Mr. Reed’s
10 IHSS eligibility back to July 2016 (the “Decision”). Reed AR 000097. The Decision was adopted
11 by CDSS. Reed AR 000087.

12 **III. PETITIONER REED IS ENTITLED TO AN ADMINISTRATIVE WRIT OF**
13 **MANDAMUS UNDER CODE OF CIVIL PROCEDURE SECTION 1094.5**

14 Mr. Reed is entitled to a writ of administrative mandamus pursuant to Code of Civil
15 Procedure § 1094.5 to reverse the Decision denying him IHSS eligibility retroactive to July 2016,
16 the date of his approved Medi-Cal eligibility determination. Respondents CDSS and DHCS did
17 not proceed in the manner required by law. The Decision’s failure to apply equitable estoppel and
18 award Mr. Reed retroactive IHSS is a prejudicial abuse of discretion. Respondents CDSS and
19 DHCS should be estopped from relying on Mr. Reed’s IHSS application date rather than his Medi-
20 Cal eligibility date to determine the start date of his retroactive IHSS eligibility.

21 The Decision was wrong because Mr. Reed met all five elements of equitable estoppel
22 against a government actor: (1) the party to be estopped was apprised of the facts; (2) the party to
23 be estopped intended that his conduct be acted upon; (3) the party asserting estoppel was ignorant
24 of the true facts; (4) the party asserting estoppel relied upon the conduct of the other party to his
25 injury; and (5) estoppel will not frustrate public policy and is required by justice. *See Lentz v.*
26 *McMahon*, 49 Cal. 3d 393, 401 (1989); *Canfield v. Prod*, 67 Cal. App. 3d 722, 730-32 (1977).

27 First, Respondents were apprised of the facts. At the time of Mr. Reed’s Medi-Cal
28 eligibility determination in 2016, Respondents and their delegated county agents were aware that

1 effective January 1, 2014, the spousal impoverishment rule must be applied to eligible individuals
2 when conducting Medi-Cal eligibility determinations. Reed AR 000015-16, 41-53.

3 Second, Respondents intended that their conduct as officials administering the Medi-Cal
4 and IHSS programs be acted upon. Respondents had multiple opportunities to apply the expanded
5 spousal impoverishment methodology to Mr. Reed’s Medi-Cal eligibility determination (in 2014
6 and 2016), but failed to do so. Reed AR 000014, 88-90. Still, Respondents intended Mr. Reed to
7 accept their eligibility determinations, and he justifiably relied on their erroneous decisions. Reed
8 AR 000014, 132:8-21. *See also Lentz*, 49 Cal. 3d at 401 (county workers who advise recipients
9 “stand in a confidential relation to them,” justifying reliance on their benefits determinations).

10 Third, Mr. Reed was ignorant of the true facts. Until 2017, Mr. Reed was not aware of the
11 expanded spousal impoverishment rule, which, if applied to his case, would make him eligible for
12 Medi-Cal with a reduced or eliminated share of cost, which would in turn have allowed him to
13 access Medi-Cal covered benefits like IHSS (for which he otherwise would have applied). Reed
14 AR 000014, 135:11-15. He only learned of the spousal improvement rule when he obtained
15 representation from Bet Tzedek Legal Services. Reed AR 000122, 139:11-15.

16 Fourth, Mr. Reed relied upon Respondents’ conduct to his detriment. He decided to forego
17 applying for IHSS based upon Respondents’ wrongful Medi-Cal determination. Reed AR
18 000136:5-137:17. The Decision acknowledges that “the timing of ACWDL 17-25 may be a crucial
19 reason why the claimant did not submit his IHSS application at an earlier date.” Reed AR 000097.

20 Fifth, retroactive IHSS eligibility will not frustrate public policy and is required by justice.
21 Public policy is promoted, not frustrated, when an individual harmed by Respondents’ failures
22 receives benefits to which he is entitled. A retroactive IHSS eligibility determination is required to
23 make Mr. Reed whole after an erroneous Medi-Cal eligibility determination. Respondents failed
24 to correctly apply the spousal impoverishment rule, and applying equitable estoppel here is required
25 by justice to achieve the purpose of the law, *i.e.*, to ensure married individuals who need Medi-Cal
26 and its covered services are properly determined to be eligible and provided with services.

27 Respondents failed to apply the expanded spousal impoverishment rule to Mr. Reed’s case
28 when he applied in 2016. Reed AR 000089. If the expanded rule had been implemented on time,

1 Mr. Reed’s 2016 application would have been correctly determined. Reed AR 000017. If it had
2 been correctly applied, Mr. Reed would be eligible for free Medi-Cal. *Id.*, Reed AR 000089. If he
3 had known he was eligible for free Medi-Cal, he would have applied for IHSS at that time, because
4 such an application would not have been futile. Reed AR 000138:23-25, 139:1-2.

5 For these reasons, the Court should issue a writ of administrative mandamus directing
6 Respondents to set aside the Decision, issue a new decision declaring Mr. Reed’s IHSS eligibility
7 date matches his retroactive Medi-Cal eligibility date of July 2016, order IHSS services retroactive
8 to that date, and order payment of retroactive IHSS wages with prejudgment interest from July 2016
9 through May 11, 2017 (his current date of IHSS eligibility).

10 **IV. PETITIONERS ARE ENTITLED TO A WRIT OF MANDATE UNDER CODE OF**
11 **CIVIL PROCEDURE SECTION 1085**

12 Mr. Reed’s case exemplifies statewide systemic failures. Many other potentially eligible
13 individuals are also unable to access all of the Medi-Cal and IHSS benefits to which they are
14 entitled. DHCS has a nondiscretionary obligation to adhere to all federal laws and regulations. 42
15 U.S.C. § 1396a(a)(1); Welf. & Inst. Code §§ 10721, 10740. As such, DHCS has a clear, present,
16 and ministerial duty to use the expanded definition of “institutionalized spouse” to determine Medi-
17 Cal eligibility. Thus, Petitioners seek an order granting a writ of mandate pursuant to Code Civil
18 Procedure § 1085 requiring DHCS to perform its ministerial duty as described below.

19 **A. DHCS Violated The Medicaid Act By Failing To Perform Its Ministerial Duty**
20 **To Provide Medi-Cal Benefits With Reasonable Promptness**

21 Contrary to the ACA’s mandate that the expanded spousal impoverishment rule “shall be
22 applied” beginning on January 1, 2014, DHCS took three and a half years to begin rolling out the
23 provision. Pub. L. No. 111-148, § 2404 (2010); Ex. 24. Now, nearly a decade after the ACA was
24 enacted and six years from the intended start date, many Medi-Cal applicants and beneficiaries are
25 still unable to access the benefits of this protection. This is a violation of the ACA and the Medicaid
26 Act’s “reasonable promptness” provision. 42 U.S.C. § 1396a(a)(8).

27 DHCS has a ministerial duty to “furnish Medicaid promptly to beneficiaries without any
28 delay caused by the agency’s administrative procedures.” 42 C.F.R. § 435.930. State law similarly
requires DHCS to “promptly” and “humanely” provide all of the Medi-Cal benefits to which

1 applicants are entitled. Welf. & Inst. Code §§ 10000, 10500. DHCS’s rollout of the expanded
2 spousal impoverishment rule was anything but reasonable, prompt, or humane.

3 In *Blanco v. Anderson*, 39 F.3d 969 (9th Cir. 1994), the Ninth Circuit held that the
4 reasonable promptness provision prohibited DHCS from approving the weekday closure of county
5 welfare departments. *Id* at 972. Because the closure delayed the receipt of Medi-Cal applications,
6 it could result in eligible individuals losing access to benefits to which they were entitled. *Id*. The
7 court held that even though the delay might only be a few days or a month of retroactive benefits,
8 that was a significant enough delay to violate Medicaid’s reasonable promptness requirement. *Id*.

9 In this case, DHCS is guilty of years of delay. This is true despite DHCS having had ample
10 lead time to ensure compliance with the ACA. Indeed, DHCS began looking at the expanded
11 spousal impoverishment rule even before the ACA was enacted in 2010. Ex. 18, p. 23:13-17,
12 26:11-15. Yet, DHCS did not begin drafting its policy guidance until 2014 and then delayed issuing
13 that guidance for another three years. *Id*.

14 Even in the face of scrutiny and pressure for its inexcusable delay, DHCS still failed to act.
15 In 2015, the Centers for Medicare and Medicaid Services (“CMS”) issued a policy letter reminding
16 states that the ACA “amended section 1924(h)(1) to *require*” expanding the application of the
17 spousal impoverishment rule. Ex. 23, p. 2 (emphasis in the original). CMS directed “[s]tates that
18 have not already done so should begin work on conforming their eligibility practices for married
19 individuals potentially in need of [home and community-based services] *as soon as possible*.” *Id*.
20 at 6 (emphasis added).

21 Throughout 2015 and 2016, consumer advocates implored DHCS to release guidance so
22 that potentially eligible individuals could access critical care. Ex. 29; Ex. 42; Ex. 30; Ex. 32. As
23 early as September 16, 2015, the advocate community raised multiple examples of beneficiaries
24 who were being harmed by DHCS’s delay and who urgently needed the provision to access Medi-
25 Cal and IHSS benefits. Ex. 29, p. 1; Ex. 31. Internally, DHCS’s staff also expressed concerns
26 about the delay, including escalating concerns to supervisors that Medi-Cal beneficiaries were not
27 able to access the expanded spousal impoverishment rule. Ex. 18, p. 36:11-21. The concerns of
28 DHCS’s staff were justified. DHCS did not provide any guidance to the counties until July 2017,

1 after Petitioners filed this action. Ex. 24. DHCS knew that its initial guidance was insufficient and
2 incomplete. Ex. 18, p. 69:10-23. Its follow-up guidance in August 2018 was both delayed by a
3 year and also insufficient and incomplete. Ex. 25; Ex. 17, p. 60:1-17.

4 In all of this time, DHCS has sent only one informational notice to potential beneficiaries,
5 which was issued in February 2018 and only to the 17,142 individuals on the waitlist for home and
6 community-based waiver programs. Exs. 35-36. This represents a mere fraction (about 6%) of the
7 number of Medi-Cal beneficiaries in the IHSS-CFCO (“Community First Choice Option”)
8 Program. Ex. 47. Nearly six years after the federal law indisputably mandated the significant
9 expansion of the spousal impoverishment rule, DHCS has still failed to provide with reasonable
10 promptness the benefits of the expanded protection.

11 **B. DHCS Violated Welfare & Institutions Code § 10500 By Failing To Perform**
12 **Its Ministerial Duty To Notify All Potentially Eligible Individuals**

13 DHCS has a ministerial duty to ensure that all Medi-Cal beneficiaries receive all “the
14 amount of aid to which he [or she] is entitled.” *Welf. & Inst. Code § 10500*. In *Diaz v. Quitariano*,
15 268 Cal. App. 2d 807 (1969), the court held that a county welfare office breached its ministerial
16 duty under Section 10500 by not informing individuals of their right to make an application for
17 welfare benefits. *Id.* at 810. *Diaz* instructs that Section 10500 clearly imposes a ministerial duty
18 to give such notification, regardless of the particular applicant’s eligibility for aid. *Id.*

19 Section 10500’s notification duty has been acknowledged by other courts. In *Thornton v.*
20 *Carlson*, 4 Cal. App. 4th 1249 (1992), the court found that implicit in the Section 10500 duty is “a
21 requirement that [CDSS] adequately advise SSI recipients of the rights and benefits to which they
22 are entitled.” *Id.* at 1258. In that case, a group of Supplemental Security Income (“SSI”) recipients
23 experiencing homelessness filed a class action alleging that CDSS had not provided them with
24 “reasonable and effective notice of the benefits available” through a special program. *Id.* at 1254.
25 Because the program was “not consistently publicized” statewide and many of the impacted aid
26 recipients were unaware of the program, the court upheld an order for CDSS to “employ reasonable
27 means of giving notice of the availability of special circumstances assistance to all SSI recipients,
28 and to form a plan for doing go.” *Id.* at 1258.

1 Here, as in *Diaz* and *Thornton*, DHCS has failed to notify thousands of Medi-Cal applicants
2 and beneficiaries of the expanded spousal impoverishment rule or advise them of their right to have
3 a correct eligibility determination. In ACWDL 17-25, DHCS identified four groups whose
4 eligibility was negatively impacted by its failure to promptly implement the expanded spousal
5 impoverishment rule. Ex. 24, p. 12-13. These include married individuals in need of home and
6 community-based services that were: (1) previously or currently on the IHSS-CFCO program;
7 (2) denied or discontinued from Medi-Cal for excess resources, like Mr. Kelley; (3) had a share of
8 cost, like Mr. Reed; and (4) were on waiver waiting lists. *Id.* at 12-13. However, DHCS has only
9 contacted one of these groups (individuals on waiver waitlists), and it only sent one letter to them
10 in February 2018, stating that they may qualify for a lower share of cost if they request an eligibility
11 redetermination using the expanded spousal impoverishment rule. Ex. 35, p. 1-5.

12 DHCS did not send a similar letter to the other three identified groups or to individuals
13 who are currently institutionalized. Ex. 17, p. 95:6-11. And it never intended to, as DHCS admits
14 that the “outreach mailer to the wait list individuals was the only formal outreach mailed to one of
15 these groups” and “[t]here was never a decision made to send notice to all potentially impacted
16 individuals.” *Id.* at 101:12-14, 98:15-16. DHCS had the access and ability to create a list of people,
17 such as those in the IHSS-CFCO program. *Id.* at 77:10-22. With a 2019 enrollment of 268,738
18 individuals, the IHSS-CFCO group is the largest of the three groups DHCS identified in ACWDL
19 17-25 but did not notify. *Compare* Ex. 47, p. 1, *with* Ex. 36, p. 5 (identifying 17,142 recipients that
20 received DHCS outreach letter, which is about 6% of the total IHSS-CFCO population).

21 DHCS’s failure to adequately publicize the expanded spousal impoverishment rule has
22 predictably resulted in thousands of potentially eligible individuals being unaware of its existence.
23 Not only has DHCS failed to notify impacted individuals, it also continues to disseminate incorrect
24 information statewide. For example, DHCS Form 7077 (revised January 2018) erroneously states
25 that the spousal impoverishment rule is only applied where one spouse lives in a nursing facility
26 and the other spouse lives at home. Ex. 44, p. 3. Likewise, a Medi-Cal Information Notice (revised
27 July 2019) still erroneously restricts an “institutionalized spouse” to only those who “are admitted
28

1 to long-term care.” Ex. 46, p. 4. This means that even those individuals seeking out official
2 information will not learn about the expanded eligibility rules.

3 **C. DHCS Violated Welfare & Institutions Code § 10500 By Failing To Create A**
4 **Retroactive IHSS Eligibility Process**

5 To date, neither DHCS nor CDSS has issued guidance related to the expanded spousal
6 impoverishment rule or its effect on retroactive IHSS eligibility to ensure that the retroactive date
7 of IHSS eligibility coincides with the retroactive date of Medi-Cal eligibility. *See* Exs. 24-25, 35.
8 This is a significant problem and a breach of DHCS’s ministerial duty to ensure all of the aid to
9 which the impacted groups are entitled. Welf. & Inst. Code § 10500. “There is no question that
10 the obligation to pay aid to which an applicant is entitled is a debt due from the county as of the
11 date the applicant was first entitled to receive aid and that the right to receive benefits vests in the
12 recipient on the first date of his entitlement thereto.” *Canfield*, 67 Cal. App. at 728. Here, DHCS
13 has unlawfully withheld benefits by failing to ensure individuals can access IHSS eligibility back
14 to the date of their Medi-Cal eligibility under the spousal impoverishment rule. The misalignment
15 between Medi-Cal and IHSS application dates can lead to months and even years of lost IHSS
16 benefits for individuals harmed by DHCS’s failure to promptly implement the spousal
17 impoverishment rule.

18 As the single state agency, DHCS is ultimately responsible for this failure. One state ALJ
19 reached out to DHCS directly searching for answers: “A lot of questions are coming up as to how
20 [the expanded spousal impoverishment rule] is being implemented from the IHSS side. We haven’t
21 seen anything on this yet.” Ex. 38. In response, DHCS staff candidly replied, “There is no
22 implementation on the IHSS side.” *Id.*

23 This lack of implementation means that neither the counties that conduct the initial IHSS
24 eligibility determinations, nor the ALJs who review these IHSS determinations, know how to
25 correctly process retroactive IHSS eligibility determinations. Petitioners exemplify the harms to
26 impacted individuals. Both were originally denied IHSS retroactive to the date of their Medi-Cal
27 eligibility because they had not made separate IHSS applications contemporaneously with their
28 Medi-Cal applications. Ex. 2, ¶¶ 8-23; Ex. 3, ¶¶ 7-18. Both appealed those decisions and were
represented at their hearings by Bet Tzedek Legal Services who made similar legal and equitable

1 arguments. *Id.* Their results were exactly opposite. *Id.* Mr. Kelley’s request was granted, and
2 Mr. Reed’s request was denied. *Id.* Mr. Kelley was able to receive reimbursement for out of pocket
3 in-home care costs, but Mr. Reed was not. *Id.*

4 DHCS should adopt the longstanding CDSS rule that IHSS eligibility may be found
5 retroactive to the date of the individual’s preceding Medi-Cal application. Ex. 27, p. 8. In response
6 to two court decisions regarding Medi-Cal reimbursement claims, current CDSS guidance states
7 that counties should use the Medi-Cal, not the IHSS, application date when deciding which
8 application date to use to establish a recipient’s eligibility for reimbursement for IHSS covered
9 services. Ex. 27, p. 8; see *Conlan v. Bontá*, 102 Cal. App. 4th 748 (2002) (“*Conlan I*”); *Conlan v.*
10 *Shewry*, 131 Cal. App. 4th 1354 (2005) (“*Conlan II*”). This rule was created because it is common
11 that a Medi-Cal application can, and often does, pre-date an IHSS application, inasmuch as an
12 individual must be eligible for Medi-Cal to be eligible for IHSS. Ex. 27, p. 8. Here, too, linking
13 the Medi-Cal and IHSS application date ensures that beneficiaries can receive reimbursement for
14 all Medi-Cal covered services, including in-home care such as IHSS. However, without DHCS
15 action, CDSS cannot apply this rule to the spousal impoverishment context. Therefore, DHCS must
16 act to ensure that retroactive IHSS eligibility determinations align with retroactive Medi-Cal
17 eligibility determinations in the spousal impoverishment context.

18 **D. DHCS Violated The Medicaid Act By Failing To Perform Its Ministerial Duty**
19 **To Reimburse Eligible Individuals For Medi-Cal Covered Expenses**

20 DHCS has a duty under federal law to ensure that the Medicaid state plan provides
21 assistance that is equal in amount, duration, and scope. 42 U.S.C. § 1396a(a)(10)(B). This
22 requirement, known as the comparability provision, creates an “equality principle” so that medical
23 assistance made available to any individual shall not be less than the medical assistance made
24 available to any other individual. See *Sobky v. Smoley*, 855 F. Supp. 1123, 1139 (E.D. Cal. 1994);
25 *Conlan I*, 102 Cal. App. 4th at 754 (2002). This duty to provide comparable assistance extends to
26 reimbursement claims. In the *Conlan* decisions, the courts held that DHCS was required to create
27 a process to ensure prompt reimbursement for covered services. 102 Cal. App. 4th at 763-64; 131
28

1 Cal. App. 4 at 1379. Reimbursement must be made for a three-month period before an application,
2 after an erroneous denial of services, and while the county is processing the application. *Id.*

3 *Conlan I* and *Conlan II* are directly applicable here. DHCS’s failure to create a process for
4 retroactive IHSS resulted in eligible individuals paying out pocket for in-home care that otherwise
5 would be covered by Medi-Cal. Because IHSS is a Medi-Cal covered service, its costs are
6 explicitly included in DHCS’s Medi-Cal reimbursement scheme. Ex. 27, p. 8. The linchpin in
7 making a successful IHSS reimbursement claim is eligibility for the IHSS program. This creates
8 cascading harms: DHCS’s failure to ensure retroactive IHSS back to the date of the Medi-Cal
9 eligibility determination results in a denial of an IHSS reimbursement claim for that gap in time.

10 Worse, as a general rule, DHCS limits retroactive IHSS reimbursement (back to the date of
11 IHSS application) to certified IHSS providers. Ex. 25, p. 17. “A beneficiary may be reimbursed
12 for services provided by *an IHSS enrolled provider* as far back as January 1, 2014, if eligible for
13 IHSS back to January 1, 2014.” *Id.* (emphasis added). This creates an additional hurdle for those
14 who are entitled to receive reimbursement or payment for uncompensated care. Ex. 15, ¶ 13.

15 Mr. Kelley and Mr. Reed’s cases demonstrate DHCS’s failure to provide comparable
16 services: Mr. Kelley was properly evaluated for retroactive IHSS and received retroactive payment
17 of more than \$20,000 for incurred costs. Ex. 1, ¶ 18. In contrast, Mr. Reed was improperly denied
18 IHSS, and therefore, his family members could not have been certified as IHSS providers and thus
19 cannot receive reimbursement for his needed in-home care. Ex. 2, ¶ 23. Mr. Reed’s wife, Vicki
20 Reed, estimates “even just looking at the time between August 2016 and May 2017, assuming
21 Matthew’s current assessment of 241 IHSS hours, that’s over \$30,000 in lost IHSS wages. *Id.*

22 **E. DHCS Has Violated Anti-Discrimination Laws**

23 By failing to implement expanded spousal impoverishment rule, DHCS has placed
24 Petitioners and numerous others at risk of unnecessary institutionalization in violation of the
25 Americans with Disabilities Act (“ADA”) (42 U.S.C. § 12101 *et seq.*), Section 504 of the
26 Rehabilitation Act (“Section 504”) (29 U.S.C. § 794 *et seq.*), and Government Code § 11135.
27 These laws require that states “administer services, programs, and activities in the most integrated
28 setting appropriate to the needs of qualified individuals with disabilities.” 28 C.F.R. §§ 35.130(d),

1 41.51(d). The integration mandate requires that persons with disabilities be served in the
2 community when: (1) the state’s treatment professionals have determined that community
3 placement is appropriate; (2) community placement is not opposed by the individual; and (3) “the
4 placement can be reasonably accommodated, taking into account the resources available” and the
5 needs of others with disabilities. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 587 (1999).
6 Plaintiffs do not need to wait until they are institutionalized to bring a claim. *Fisher v. Okl. Health*
7 *Care Auth.*, 335 F.3d 1175, 1181-82 (10th Cir. 2003); *Brantley v. Douglas*, 656 F. Supp. 2d 1161,
8 1170 (N.D. Cal. 2009). Individuals at risk of placement in nursing homes are also protected. *Id.*

9 Petitioners Kelley and Reed, and others similarly situated, easily meet the first two prongs
10 of the *Olmstead* test: they live at home and are fighting to remain there. Ex. 1, ¶¶ 6, 9, 10; Ex. 2,
11 ¶¶ 9, 19-20, 23-24; Ex. 3, ¶¶ 6-8, 11, 23; *see also* Ex. 6, ¶¶ 6, 9, 11-12. As to the third prong,
12 applying the federally-mandated spousal impoverishment methodology to ensure that eligible
13 individuals are not forced into costly and unnecessary institutional care is indisputably reasonable.
14 DHCS’s actions has placed Petitioners and others at risk of unnecessary institutionalization in
15 violation of the ADA, Section 504, and Government Code Section 11135. *Id.*

16 The ADA and Section 504 also prohibit methods of administration which have a
17 discriminatory effect on people with disabilities. 28 C.F.R. § 35.130(b)(3), 28 C.F.R. § 41.51(b)(3),
18 and 45 C.F.R. § 84.4(b)(4). DHCS violated this provision by, *inter alia*, its failures as described
19 above to ensure that eligible individuals receive the benefit of spousal impoverishment rule, thereby
20 placing them at risk of unnecessary institutionalization.

21 **V. CONCLUSION**

22 For the reasons above, Petitioners respectfully request that the Court grant the relief
23 requested in the Fourth Amended Petition.

24 Dated: November 8, 2019

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