UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

CALIFORNIA ASSOCIATION OF HEALTH FACILITIES,

Plaintiff,

vs.

DAVID MAXWELL-JOLLY, et al.;

Defendants.

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DEVELOPMENTAL SERVICES NETWORK, et al.,

Plaintiffs,

vs.

DAVID MAXWELL-JOLLY, et al.;

Defendants.

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Consolidated Cases:

Case No. CV 10-3259 CAS (MANx)
Case No. CV 10-3284 CAS (MANx)

**ORDER GRANTING PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION**

## I. INTRODUCTION

On April 30, 2010, plaintiffs Developmental Services Network and United Cerebral Palsy/Spastic Children's Foundation of Los Angeles and Ventura Counties, in CV 10-3284 CAS (MANx), and California Association of Health Facilities, in CV 10-3259 CAS (RZx), filed the instant actions against David Maxwell-Jolly, Director of the

California Department of Health Care Services (the "Director") and the California Department of Health Care Services (the "Department").[1] The Department is a California agency charged with the administration of California's Medicaid program, Medi-Cal. Plaintiffs are entities that represent certain Medi-Cal providers, specifically intermediate care facilities for the developmentally disabled and the mentally retarded (respectively, "ICF/DD facilities" and "ICF/MR facilities"), and freestanding pediatric subacute facilities ("FSP facilities").

On July 28, 2009, California Governor Arnold Schwarzenegger signed into law Assembly Bill X4 5 ("AB 5" ), the budget trailer bill for California fiscal year 2009-2010. AB 5 amends Cal. Welf. & Inst. Code § 14105.191, in part, and effectively "freezes" the Medi-Cal reimbursement rates for certain designated services rendered during the 2009-2010 rate year and each rate year thereafter at 2008-2009 levels. Cal. Welf. & Inst. Code § 14105.191(f). Among the designated services, are services provided by ICF/DD facilities, ICF/MR facilities, and FSP facilities.

Plaintiffs seek to enjoin implementation or enforcement of these rate freeze provisions in AB 5 on the grounds that they violate Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq. (the "Medicaid Act"), and therefore are invalid under 42 U.S.C. § 1983 and the Supremacy Clause of the United States Constitution, U.S. CONST. art. VI, cl. 2. CAHF Complaint ¶ 1; DSN Complaint ¶ 1. Specifically, plaintiffs allege that AB 5 violates 42 U.S.C. § 1396a(a)(30)(A) of the Medicaid Act ("Section 30(A)"), because neither the Director nor the California legislature considered the "quality of care" and "equal access" provisions of Section 30(A), or whether reimbursement rates are reasonably related to provider costs, before its implementation. CAHF Complaint ¶¶ 50–51; DSN Complaint ¶¶ 10, 38–39. Plaintiffs further allege that AB 5 is unlawful because the Director implemented the rate freeze through an amendment to the State's

[1] On June 15, 2010, the Court ordered the two matters consolidated for all purposes.

Medi-Cal Plan without prior federal approval. CAHF Complaint ¶¶ 57–59; DSN Complaint ¶¶ 10, 41. Finally, plaintiffs allege that AB 5 was enacted in violation of the public process provisions of 42 U.S.C. § 1396a(a)(13)(A) ("Section 13(A)"). CAHF Complaint ¶¶ 52–54; DSN Complaint ¶¶ 10, 40.

## II. BACKGROUND

### A. Statutory Background

Medicaid is a cooperative federal program whereby the federal government provides funds to participating states to help defray the expense of providing health care services to low income and needy citizens. State participation is voluntary; however, once a state chooses to participate by accepting federal funds, it must comply with requirements imposed by the Medicaid Act. See Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1493 (9th Cir. 1997) ("Orthopaedic Hospital"). Because California has elected to participate in the Medicaid program, it must administer its state Medicaid program, Medi-Cal, in compliance with a State Medicaid Plan ("State Plan") that has been pre-approved by the Secretary of the U.S. Department of Health and Human Services, and which complies with federal Medicaid law, including the requirements set forth in 42 U.S.C. § 1396a(a)(1)-(70). The State Plan is "a comprehensive written statement . . . describing the nature and scope of [the State's] Medicaid program and giving assurance that it will be administered in conformity with the specific requirements of [federal Medicaid law]." 42 C.F.R. § 430.10. The agency charged with approving State Plans is the Centers for Medicare and Medicaid Services ("CMS"), an arm of the Department of Health and Human Services. Id. §§ 400.200, 430.12. When a state wishes to make changes to its State Plan, it must submit a State Plan Amendment to CMS. Id. § 430.12. CMS may approve or disapprove of the State Plan Amendment, or it may request more information from the State before making a final determination. Id. § 430.16. If CMS does not act on the State Plan Amendment within 90 days, the amendment is considered approved. Id. § 430.16(a)(1). If CMS requests additional information, however, the 90-day period for CMS action on the State Plan Amendment begins on the day CMS

receives the information. Id. §§ 430.16(a)(2), 447.256.

The Medicaid Act further requires that, prior to establishing reimbursement rates, California provide "methods and procedures" for the payment of care and services that (1) are "consistent with efficiency, economy, and quality of care," and (2) ensure their availability to the Medicaid population to the same "extent as they are available to the general population in the geographic area." 42 U.S.C. § 1396a(a)(30)(A). These requirements are known, respectively, as the "quality of care" and "equal access" provisions of Section 30(A) of the Medicaid Act. In Orthopaedic Hospital, the Ninth Circuit interpreted Section 30(A) to require the Director to set reimbursement rates that "bear a reasonable relationship to efficient and economical hospitals' costs of providing quality services, unless the Department shows some justification for rates that substantially deviate from such costs." 103 F.3d at 1496; see also Indep. Living Ctr. of S. Cal. v. Maxwell-Jolly, 572 F.3d 644, 651–52 (9th Cir. 2009) ("ILC II") (affirming the standards established in Orthopaedic Hospital). To meet this statutory requirement, the Ninth Circuit held that the Director "must rely on responsible cost studies, its own or others', that provide reliable data as a basis for its rate setting." Orthopaedic Hospital, 103 F.3d at 1496. In addition, for certain providers, including hospital service providers, California must establish rates through a public process that includes publication of the proposed rates and their underlying methodologies, such that providers are "given a reasonable opportunity for review and comment." 42 U.S.C. § 1396a(a)(13)(A). Further, the state must administer Medi-Cal in accordance with Medicaid regulations; applicable state law, as specified in sections 14000 to 14124 of the Welf. & Inst. Code; and Medi-Cal regulations.

**B. Procedural Background**

In February 2010, this Court granted a preliminary injunction in another action challenging the same rate freeze as applied to hospital based skilled nursing and subacute facilities. See Cal. Hosp. Ass'n v. Maxwell-Jolly ("CHA I"), Case No. 09-CV-8642, Order (C.D. Cal. Feb. 24, 2010). The Court enjoined the rate freeze on the

grounds that plaintiff was likely to succeed on its claim that the freeze was enacted by the California legislature without complying with Section 30(A). CHA I, No. 09-8642, slip op. at 5–10. Because the Court found that plaintiff demonstrated a likelihood of success on the merits on its section 30(A) claim, the Court did not address the merits of plaintiff's remaining claims. Id. at 10. The Court further found that plaintiff had sufficiently demonstrated that its member hospitals would suffer irreparable harm absent a preliminary injunction because the rate freeze was causing them to be paid less than they otherwise were entitled and the Eleventh Amendment barred them from pursuing any reimbursement shortfall in an action for damages. Id. at 10–14.

In May 2010, plaintiffs filed the instant motions seeking to preliminarily enjoin application of the rate freeze as applied to their members. See Doc. 6. Prior to the hearing on the motion for a preliminary injunction, the Court stayed the case. See Doc. 34. The Court found that good cause existed to stay the case because there was then pending before the United States Supreme Court the Director's petitions for certiorari in Independent Living Center of Southern California, Inc. v. Maxwell-Jolly, U.S.S.C. Case No. 09-958 ("ILC II"), and Maxwell-Jolly v. California Pharmacists Ass'n ("Cal. Pharm."), U.S.S.C. Case No. 09-1158. On January 18, 2011, the Supreme Court partially granted review in ILC II, limited to the question of whether Medicaid recipients and providers may maintain a private cause of action under the Supremacy Clause to enforce Section 30(A) by asserting that the provision preempts a state law that reduces reimbursement rates.[2]

On March 16, 2011, plaintiffs filed an ex parte application to lift the stay in this case, arguing that during the stay they continued to suffer irreparable harm and

[2] Subsequent to the stay that was issued inthis case, the Director filed a petition for certiorari in Maxwell-Jolly v. Santa Rosa Mem'l Hosp., U.S.S.C. Case No. 10-283, a case concerning some of the same rate reductions at issue in ILC II and Cal. Pharm. The petitions for certiorari in Santa Rosa and Cal. Pharm. raise identical legal issues to those in ILC II and, consequently, the Supreme Court is addressing them together with ILC II.

irrespective of the Supreme Court's decision in ILC II, the rate freeze is invalid because the Department implemented it without first obtaining federal approval. On March 28, 2011, the Court granted plaintiffs' ex parte application to lift the stay and restored plaintiffs' motions for a preliminary injunction to the calendar.

On April 20, 2011, the parties filed supplemental briefs on the pending motions for preliminary injunction. After carefully considering the arguments set forth by both parties, the Court finds and concludes as follows.

## III. LEGAL STANDARD

A preliminary injunction is an "extraordinary remedy." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 129 S. Ct. 365, 375 (2008). The Ninth Circuit summarized the Supreme Court's recent clarification of the standard for granting preliminary injunctions in Winter as follows: "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Am. Trucking Ass'n, Inc. v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009); see also Cal Pharms. Ass'n v. Maxwell-Jolly, 563 F.3d 847, 849 (9th Cir. 2009) ("Cal Pharm. I"). Alternatively, "'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the Winter test are also met." Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1132 (9th Cir. 2011). A "serious question" is one on which the movant "has a fair chance of success on the merits." Sierra On-Line, Inc. v. Phoenix Software, Inc., 739 F.2d 1415, 1421 (9th Cir. 1984).

## IV. DISCUSSION

### A. Success on the Merits/Serious Legal Questions

#### 1. Standing

As a threshold matter, the Director contends that plaintiffs have not established that they have Article III standing. Opp'n at 20. In order to establish Article III

standing, a plaintiff must: (1) demonstrate an injury in fact, which is concrete, distinct and palpable, and actual or imminent; (2) establish a causal connection between the injury and the conduct complained of; and (3) show a substantial likelihood that the requested relief will remedy the alleged injury in fact. See McConnell v. Fed. Election Comm'n, 540 U.S. 93, 225-26 (2003). An association has standing to bring suit on behalf of its members where any of its members would have standing in their own right, the interests at stake are germane to the organization's purpose, and the relief request does not require participation of individual members. Colwell v. Dep't of Health & Human Servs., 558 F.3d 1112, 1122 (9th Cir. 2009). "The general rule applicable to federal court suits with multiple plaintiffs is that once the court determines that one of the plaintiffs has standing, it need not decide the standing of the others." Leonard v. Clark, 12 F.3d 885, 888 (9th Cir. 1993).

Here, the Court finds that plaintiffs have Article III standing to challenge the rate freeze. CAHF is a trade association representing the interests of hundreds of California long-term care facilities, including all categories of ICF/MR facilities and FPS facilities. See Declaration of Darrly Nixon ¶ 3. DSN is a trade association representing the interests of hundreds of California intermediate care facilities, including ICF/DD facilities. DSN Complaint ¶ 3. The Ninth Circuit has recognized that plaintiffs' individual member facilities would have standing to pursue this action in their own right. Indep. Living Ctr. of S. Cal. v. Shewry, 543 F.3d 1050, 1065 (9th Cir. 2008) ("ILC I") (holding that Medi-Cal providers have Article III standing to challenge legislation reducing payments to providers). Moreover, plaintiffs have brought the instant actions in their representative capacities in an effort to prevent injury to their members resulting from the implementation of the rate freeze enacted in AB 5. As such, the lawsuit is germane to plaintiffs' purpose and does not require the individual participation of their members. See Colwell, 558 F.3d at 1122.

The Director also argues for the first time in his supplemental opposition that plaintiffs lack prudential standing to challenge the rate freeze because plaintiffs' claims

(1) violate the rule against third party standing, Warth v. Seldin, 422 U.S. 490, 499 (1975); (2) are barred by the prohibition against "generalized grievances," Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 475 (1982); and (3) are barred because plaintiffs, as providers, are not within the "zone of interests" protected by the Medicaid Act provisions at issue, Valley Forge, 454 U.S. at 475. Dir. Supp. Mem. at 8–9. Unlike the Article III standing requirements, prudential standing doctrines are non-constitutional limitations on the Court's review. See ILC I, 543 F.3d at 1065 n.17 (citing Bd. of Natural Res. v. Brown, 992 F.2d 937, 945–46 (9th Cir. 1993)). To the extent that the Director's arguments are directed toward plaintiffs' challenges under the Supremacy Clause, they are unavailing for the reasons set forth in ILC I and Cal. Pharm. I. See ILC I, 543 F.3d at 1064–65; Cal. Pharm. I, 563 F.3d at 852–53; see also Cal. Hospital Ass'n v. Maxwell-Jolly, Civ No. 10-3465 FCD/EFB, 2011 WL 836706, at *19–20 (E.D. Cal. Mar. 4, 2011) ("CHA II") (rejecting the Director's prudential standing argument in challenge to similar rate freeze brought by hospital providers).

**2. Section 30(A)**

This Court has already found that the rate freeze provisions of AB 5, codified at Cal. Welf. & Inst. Code §§ 14105.191(f), are likely preempted by federal law because the rate freeze was not enacted in compliance with Section 30(A). See CHA I, No. 09-8642, slip op. at 5–10. The Court's ruling in CHA I was predicated on the Ninth Circuit's holding that Medicaid recipients and providers may maintain a private cause of action under the Supremacy Clause to enjoin implementation of state legislation preempted by the Medicaid Act. See ILC I, 543 F.3d at 1065–66; ILC II, 572 F.3d at 652–53. The Supreme Court has granted certiorari in ILC II and is currently set to review whether Section 30(A) is enforceable in federal court through the Supremacy Clause. See ILC II, U.S.S.C. Case No. 09-958.

Notwithstanding the Supreme Court's review in ILC II, plaintiffs maintain that they are likely to prevail on their Section 30(A) claim. CAHF Supp. Mem. at 1 n.1.

Plaintiffs argue that unless and until the Supreme Court actually reverses the Ninth Circuit's decision in ILC II, that precedent should control. Id. The Court recognizes that at this time the Ninth Circuit's ruling in ILC II is still good law and controlling in this circuit. See Hart v. Massanari, 266 F.3d 1155, 1171 (9th Cir. 2001) ("Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court."). In light of the pending Supreme Court proceedings in ILC II, however, the Court finds that it would be imprudent to resolve the present motions under Section 30(A). For now, suffice it to say that plaintiffs' claims under Section 30(A) present a "serious question going to the merits." Wild Rockies, 632 F.3d at 1132.

**3. Prior Federal Approval of the Rate Freeze**

Plaintiffs argue that they are likely to succeed on their claim that the Director's implementation and application of the rate freeze is unlawful because CMS has not approved an amendment to California's State Plan. CAHF Mot. at 13–14; CAHF Reply at 13–16; CAHF Supp. Mem. at 2–4. After the passage of AB 5, the Department submitted to CMS State Plan Amendment No. 09-019 ("SPA 09-019"), which proposed changes to the rate methodology affecting long term care providers by maintaining the level of reimbursement in effect for the 2009–2010 rate year and each year thereafter. See Declaration of Jordan B. Keville ¶¶ 2–3, Exh. A. On December 4, 2009, CMS requested additional information on SPA 09-019. Id. To date, it appears that CMS is still waiting for additional information, and has not approved SPA 09-019. See Second Supp. Decl. of Gary Macomber ¶ 7; Supp. Decl. of Jordan B. Keville ¶¶ 4–5, Exh. B.

The Ninth Circuit has held that the Director must obtain federal approval before implementing amendments to the State Plan. See Exeter Mem'l Hosp. Ass'n v. Belshe, 145 F.3d 1106, 1108 (9th Cir. 1998). In Exeter, the Ninth Circuit resolved a split in district court authority over whether federal approval was required before the Department could implement amendments to the State Plan. Id. at 1107. The court affirmed its prior holdings in Or. Ass'n of Homes for the Aging, Inc. v. Oregon, 5 F.3d

1239 (9th Cir. 1993) and Wash. State Health Facilities Ass'n v. Wash. Dep't of Soc. & Health Servs., 698 F.2d 964 (9th Cir. 1982) (per curiam), that a state Medicaid agency may not implement amendments to a State Plan unless it has received prior federal approval. Exeter, 145 F.3d at 1108. The court based its holding on the "overall statutory framework [of the Medicaid Act] rather than the particular language of the statute relating to amendments to state plans." Id. (citing Washington, 698 F.2d at 965). More recently, two Eastern District of California cases decided by the Hon. Frank C. Damrell, Jr., have reaffirmed that the lack of prior CMS approval for amendments to the State Plan is grounds for enjoining a rate freeze. See Cal. Ass'n of Rural Health Clinics v. Maxwell-Jolly, 748 F. Supp. 2d 1184, 1198–1200 (E.D. Cal. 2010) ("CARHC"); CHA II, 2011 WL 836706, at *15–18.

The Director argues that Exeter is distinguishable because it construed provisions of the Medicaid Act that were repealed in the Boren Amendment.[3] Dir. Supp. Mem. at 2–4. The Director is correct in noting that the Ninth Circuit in Exeter declined to an express a view as to how the elimination of the Boren Amendment would impact subsequent challenges. See Exeter, 145 F.3d at 1109 ("We express no opinion as to what effect that statute may have upon the validity of any other or future amendments to Medi-Cal."). As Judge Damrell points out, however, "[t]he Ninth Circuit [in Exeter] did not tie its holding to any specific statutory language, and thus, the subsequent repeal of the Boren Amendment does not render the decision inapposite. . . ." CARHC, 748 F. Supp. 2d at 1199. This interpretation is fortified by Judge Levi's reasoning in the underlying decision in Exeter. See Exeter Mem'l Hosp. Ass'n v. Belshe, 943 F. Supp. 1239, 1242–44 (E.D. Cal. 1996). In reaching the conclusion that the state could not

[3] The Boren Am endment, previously codified at 42 U.S.C. § 1396a(a)(13)(A), required states to set hospital reimbursement rates that were "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities." Wilder v. Va. Hosp. Ass'n , 496 U.S. 498, 501–02 (1990) (quoting 42 U.S.C. § 1396a(a)(13)(A) (1982 ed., Supp. V)).

implement a new Medicaid reimbursement rate structure prior to federal approval of the State Plan Amendment, Judge Levi relied almost entirely on the importance of the State Plan in the overall structure of the Medicaid Act. See id. at 1242 ("In short, the State must pay the rates approved in the State plan and therefore cannot pay rates proposed in an amendment until the proposed amendment has been approved and made part of the State plan. Any other interpretation of the plain language of the statute and regulations would be inconsistent with the centrality of an approved State plan to the structure of the Act.").[4]

The Director further maintains that although the Medicaid regulations contemplate CMS approval for material changes to the State Plan, they do not mandate that such approval be obtained before a state implements the change. Dir. Supp. Mem. at 4. As recognized in CARHC, this argument was explicitly rejected by Judge Levi in his opinion in Exeter. See CARHC, 748 F. Supp. 2d at 1200; see also Exeter, 943 F. Supp. at 1243 (to permit implementation of a State Plan amendment pending federal approval "would be inconsistent with the function of the State plan, the approval process for State plans and amendments, and the directive that the States 'must pay' reimbursement according to the methods specified in an approved State plan.").

Finally, the Director contends that plaintiffs do not have a private right of action to challenge an amendment to the State Plan. Dir. Supp. Mem. at 5–6.[5] Under controlling Ninth Circuit precedent, Medicaid providers may bring a claim under 42 U.S.C. § 1983 to enjoin enforcement of changes to Medi-Cal reimbursement rates prior

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[4] It also bears mention that the Ninth Circuit rejected the Director's argument that the repeal of the Boren Amendment undermined the substantive and procedural requirements of Section 30(A) as set forth in Orthopaedic Hospital. See ILC II, 572 F.3d at 654–55.

[5] At oral argument, the Director requested to submit additional briefing on whether plaintiffs have a private right of action to assert a State Plan Amendment claim. Because the Court finds the briefing on this issue adequate, see Dir. Supp. Mem. at 5–6, the Court denies the Director's request.

to federal approval of a State Plan Amendment.[6] See Exeter, 145 F.3d at 1107; Oregon, 5 F.3d at 1240; Washington, 698 F.2d at 965 n.4; see also CARHC, 748 F. Supp. 2d at 1199; CHA II, 2011 WL 836706, at *16–17. To the extent the Director urges the Court to ignore settled Ninth Circuit precedent on this issue, the Court declines to do so.

Accordingly, the Court finds that plaintiffs are likely to succeed on their claim that the Director's implementation of the rate freeze in advance of CMS approval is unlawful. Because the Court finds that plaintiffs have demonstrated a likelihood of success on the merits of their State Plan Amendment claim, the Court declines to address plaintiffs' claim under Section 13(A) for purposes of the present motion.

**B. Irreparable Harm**

Plaintiffs assert that their members are being irreparably harmed because they are being reimbursed less now than they otherwise would be absent the rate freeze provisions in AB 5. CAHF Mot. at 14–17; DSN Mot. at 19–21; CAHF Reply at 17–23; CAHF Supp. Mem. at 8–10.

Traditionally, monetary losses alone are not irreparable because they can be later remedied by a damage award. L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 634 F.2d 1197, 1202 (9th Cir. 1980). The Ninth Circuit has recognized an exception to this rule where a plaintiff would be unable to recover damages due to a State's Eleventh

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[6] At oral argument, the Director argued that plaintiffs have alleged their State Plan Amendment claim under the Supremacy Clause and not section 1983. Judge Damrell rejected this exact same argument in CHA II, and this Court is similarly unmoved. In Paragraph 1 of its complaint, CAHF alleges that the action is brought pursuant to "the Supremacy Clause and 42 U.S.C. § 1983." CAHF Complaint ¶ 1. CAHF's State Plan Amendment claim, although nominally asserted under the Supremacy Clause, incorporates by reference all previous paragraphs of the complaint. "Thus, the complaint can be read as alleging each of the claims for relief under the Supremacy Clause *and/or* Section 1983." CHA II, 2011 WL 836706, at *17 (emphasis in original). Moreover, even though DSN's complaint does not specifically allege a claim under section 1983, "the Ninth Circuit recognized in Wash. State Health, that while the plaintiffs there did not plead a claim for relief under Section 1983, 'it is clear that they are properly in federal court under this provision.'" Id. (quoting Washington, 698 F.2d at 965 n.4).

Amendment immunity. Cal. Pharm. I, 563 F.3d at 851–52 ("Because the economic injury doctrine rests only on ordinary equity principles precluding injunctive relief where a remedy at law is adequate, it does not apply where, as here, the Hospital Plaintiffs can obtain no remedy in damages against the state because of the Eleventh Amendment."). Given that plaintiffs' members are barred by the Eleventh Amendment from obtaining retroactive relief in federal court from the AB 5 rate provisions, they can establish irreparable harm by demonstrating that their members "will lose considerable revenue through [a] reduction in payments that they will be unable to recover. . . ." Cal Pharms. Ass'n v. Maxwell-Jolly, 596 F.3d 1098, 1113–1114 (9th Cir. 2010) ("Cal. Pharm. II").

The Court finds that plaintiffs have met their burden. Welfare and Institutions Code section 14105.191, as amended by AB 5, effectively freezes at 2008–09 levels reimbursement rates for services rendered by, among other things, ICF/DD facilities, ICF/MR facilities, and FPS facilities, "during the 2009–10 rate year and each rate year thereafter." Cal. Welf. & Inst. Code § 14105.191(f). Plaintiffs state that but for the application of the rate freeze, the Department would calculate updated rates that would have included an increase to account for inflation. Declaration of Darryl Nixon ¶¶ 8–10. Based on historical rate data and the Department's own data regarding "unfrozen" ICF/DD, ICF/MR, and FPS rates for the 2009–2010 rate year, plaintiffs argue that it is evident providers operating these facilities are being paid less now than they otherwise would be.[7] Declaration of Nancy Hayward ¶¶ 6–8, Exhs. A & B; Declaration of P. Dennis Mattson, Ph.D ¶ 5.

By way of example, plaintiffs state that CAHF member Hilldale Habilitation

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[7] Although the Department has not released the "unfrozen" rates for the 2010–2011 rate year, plaintiffs state that the available data demonstrates that this fact remains true. CAHF's Supp. Mem. at 8–9 (citing Second Supp. Decl. of Nancy Hayward (Hayward 2nd Supp. Decl.) ¶¶ 5–6; Second Supp. Decl. of Gary Macomber (Macomber 2nd Supp. Decl.) ¶¶ 5–6.

Center, an ICF/DD facility, is currently being paid for its services at a "frozen" rate of $175.03, while the Department has calculated an "unfrozen" rate for the facility of $179.88 for 2009–2010. Declaration of Nancy Hayward ¶ 8a. Annualized for the entire year, the differential in reimbursement rates results in total losses to the facility of $100,278.60. Id. ¶ 8a, Exh. C. These losses appear to continue for the 2010-2011 rate year. For example, plaintiffs estimate that ICF/DD facilities with 7–15 beds will lose between $56,000 and $73,000 in Medi-Cal reimbursement during the 2010–2011 rate year, and FPS facilities will lose a minimum of nearly $700,000 for the same time period. Hayward 2nd Supp. Decl. ¶ 6, Exh. A; Macomber 2nd Supp. Decl. ¶ 6.

Despite these ongoing losses, the Director argues that the Court should deny the request for a preliminary injunction on the basis that plaintiffs "delayed" in initiating this action relative to when the rate freeze went into effect. Opp'n at 21–22. "[D]elay by itself is not a determinative factor in whether the grant of interim relief is just and proper." Miller v. Cal. Pac. Med. Ctr., 991 F.2d 536, 543–44 (9th Cir. 1993). The factor of delay is only material where the harm sought to be prevented already has occurred and the parties cannot be returned to the status quo. McDermott v. Ampersand Publ'g, LLC, 593 F.3d 950, 965 (9th Cir. 2010). Stated differently, where the delay is such that it places the parties in a position where a preliminary injunction will "not actually make a practical difference," equitable relief may be denied. Id. That is plainly not the case here. As discussed above, plaintiffs' members have been subjected to the rate freeze since August 1, 2009, and continue to be paid less now than they otherwise would be absent application of the rate freeze. Because this shortfall cannot be remedied retroactively, plaintiffs' members continue to suffer irreparable harm.

Alternatively, the Director argues that plaintiffs cannot establish irreparable harm because they may recover retroactive relief in a collateral state court action or through an administrative process. Dir. Supp. Mem. at 9–10. The Ninth Circuit rejected this argument in Cal. Pharm. I. There, the court acknowledged that damages may later become available to plaintiffs in state court, but stated that federal courts must "consider

only prospective federal remedies for the purpose of gauging whether the harm caused to [plaintiffs] and their members is irreparable." Cal. Pharm. I, 563 F.3d at 852 n.2 (emphasis in original) (relying on United States v. New York, 708 F.2d 92, 93–94 (2d Cir. 1983) (per curiam)).

In sum, the Court finds that plaintiffs have sufficiently demonstrated that there is a likelihood that certain ICF/DD facilities, ICF/MR facilities, and FPS facilities "will lose considerable revenue" as a result of the rate freeze implemented by AB 5. Cal. Pharm. II, 596 F.3d at 1113–14. This harm is irreparable because if the Court does not grant the preliminary injunction, plaintiffs' members would be barred by the Eleventh Amendment from obtaining retroactive relief in federal court. See Cal. Pharm. I, 563 F.3d at 851–52.

**C. Balance of Hardships and Public Interest**

While the Court is mindful of the difficulty facing the State of California in light of its fiscal crisis, the Ninth Circuit has held that "[s]tate budgetary considerations do not . . . in social welfare cases, constitute a critical public interest that would be injured by the grant of preliminary relief." ILC II, 572 F.3d at 659. Further, the Ninth Circuit has determined that "it would not be equitable or in the public's interest to allow the state to continue to violate the requirements of federal law, especially when there are no adequate remedies available to compensate the [plaintiffs] for the irreparable harm that would be caused by the continuing violation." Cal. Pharm. I, 563 F.3d at 852–53. Given that the State may decide to implement a rate change upon complying with the mandates of federal law, the Court finds that the balance of equities and the public interest weigh in favor of granting the injunction.[8]

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[8] The Court notes that this does not appear to be a case where the balance of hardships tips sharply in favor of plaintiffs because there is no showing on the present record that Medi-Cal beneficiaries are likely to be forced to go without medical care due to the implementation of the rate freeze. See ILC II, 572 F.3d at 657–58 ("it is not legal error to conclude, when balancing the medical or financial hardship to Medi-Cal recipients (continued...)

## V. CONCLUSION

In accordance with the foregoing, the Court hereby GRANTS plaintiffs' motions for preliminary injunction. The Court hereby ORDERS the Director, his agents, servants, employees, attorneys, successors, and all those working in concert with him to refrain from enforcing Cal. Welf. & Inst. Code § 14105.191(f), including refraining from effectively freezing at 2008–2009 levels the Medi-Cal reimbursement rates for services provided by intermediate care facilities for the developmentally disabled and the mentally retarded, and freestanding pediatric subacute facilities during the 2009–2010 rate year and each rate year thereafter.

At oral argument, the Director orally moved for a stay of the preliminary injunction pending the Director's emergency appeal of this order. In deciding whether to issue a stay pending appeal, the Court considers "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." See Golden Gate Rest. Ass'n v. City & County of S.F., 512 F.3d 1112, 1115 (9th Cir. 2008) (citations omitted). The Court finds that the relevant factors do not weigh in favor of granting the Director's motion. Most importantly, there is no evidence that the Director will suffer irreparable injury absent a stay, and issuance of a stay would substantially injure plaintiffs because their members would continue to lose considerable revenue that cannot be recouped retroactively in federal court.

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[8](...continued)
against the financial hardship to the state, that the balance of hardships tipped sharply in favor of the plaintiffs.") (internal quotations omitted). Thus, the "serious questions" analysis in Wild Rockies is inapplicable. See Wild Rockies, 632 F.3d at 1132. Nevertheless, the Court finds that it is appropriate to issue the preliminary injunction because plaintiffs have demonstrated that they are likely to succeed on the merits of their State Plan Amendment claim and the other Winter elements are satisfied. See Am. Trucking, 559 F.3d at 1052.

Accordingly, the Court DENIES the Director's motion for a stay pending appeal.

IT IS SO ORDERED

Dated: May 5, 2011

Christina A. Snyder

CHRISTINA A. SNYDER
UNITED STATES DISTRICT JUDGE