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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO/OAKLAND DIVISION

DAVID OSTER, *et al.*,

Plaintiffs,

v.

LIGHTBOURNE, *et al.*,

Defendants.

Case No. CV 09-04668 JSW

***EX PARTE* APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE WHY PRELIMINARY INJUNCTION SHOULD NOT ISSUE**

TRO REQUESTED BY 4:00 P.M. TODAY (THURSDAY, DECEMBER 1, 2011)

Pursuant to Local Rule 65-1, Plaintiffs David Oster *et al.*, on behalf of themselves and members of proposed Class B, hereby apply for a temporary restraining order ("TRO") and order to show cause why a preliminary injunction should not issue to enjoin the reduction, by 20 percent, of crucial In-Home Supportive Services ("IHSS") hours that currently enable them to remain safely in their own homes. This reduction will cause severe, irreparable injury to hundreds of thousands of low-income, elderly and disabled individuals, unless a TRO issues.

Although the hours reduction does not take effect until January 1, 2012, Defendants are in the process of implementing that reduction by making programming changes to the statewide IHSS database (called the "Case Management Information Payrolling System," or "CMIPS") and printing Notices of Action that will be sent to IHSS recipients. Plaintiffs request that the Court rule on the TRO application **by 4:00 p.m. today (Thursday, December 1, 2011)**, because Defendants have stated that they will "pull the switch" on changes to CMIPS at the close of the business day on Thursday December 1, 2011. Fifth Declaration of Melinda Bird ("Bird Decl.") ¶10. Defendants have also stated that if no injunction issues today and the CMIPS switch is pulled, they will not be able to guarantee that the changes can be reversed by January 1, 2012 if an injunction is issued at a later date. *Id.* ¶11.

In the alternative, if this Court does not act on the TRO application today, Plaintiffs request a ruling on the TRO application by Tuesday, December 6, 2011, to ensure that this Court has an opportunity to rule before Defendants send Notices of Action reducing benefits, and to give Defendants as much time as possible to reverse the CMIPS programming implementing the 20 percent reduction. Plaintiffs have acted diligently to file this action and motion as soon as practicable, but have been unable to do so any sooner because it has been unclear whether the cuts would take effect and how they would be implemented until after the close of business on November 29, 2011.

As explained in greater detail in Plaintiffs' memorandum in support of TRO, Plaintiffs seek to enjoin Defendants from implementing California Senate Bill 73 (Stats. 2011, c. 34, §§1-3) (hereinafter ("SB 73")), which will otherwise impose across-the-board, substantial reductions in authorized IHSS service hours for 372,000 IHSS recipients (all IHSS recipients except

approximately 70,000 individuals who are automatically exempted). Although SB 73 permits some IHSS recipients to apply for restoration of the reduced hours based on a showing of serious risk of out-of-home placement, that process fails to offer adequate protections for IHSS recipients because, among other things, it ignores that recipients already receive only those hours that are necessary to keep them safely at home, fails to provide for hours restoration based on a showing of likely risk to health, and imposes the burden on recipients to apply for restorations rather than requiring county social workers to review their caseload and identify individuals at risk. Moreover, Defendants have deemed two-thirds of IHSS recipients ineligible for hours restorations based on their functional ranks, which this Court has already held are not reasonable measures of need for IHSS services. Finally the notices of action Defendants intend to send violate constitutional due process requirements in much the same way as did the notices of action this Court previously enjoined.

Plaintiffs further seek class certification and amendment of the complaint on shortened time, and ask that relief be granted on a class-wide basis.

GROUNDS FOR MOTION

This motion is made, pursuant to Federal Rules of Civil Procedure 65 and Civil Local Rules 7-10 and 65-1, on the ground that Plaintiffs have demonstrated that they meet the requirements for a TRO and preliminary injunction: (1) a likelihood of success on the merits, (2) likely irreparable injury absent interim injunctive relief, (3) the balance of hardships tips in Plaintiffs' favor, and (4) an injunction is in the public interest. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011) (standard is sliding scale; stronger showing of irreparable harm decreases showing needed on merits, and vice versa).

As further explained in Plaintiffs' Memorandum in support of TRO and Order to Show Cause Why a Preliminary Injunction Should Not Issue, Plaintiffs have shown that the substantial reduction of IHSS services to 372,000 elderly, disabled, or blind individuals who cannot safely remain in their homes without such services will cause irreparable harm in the form of serious and imminent risk of injury, declining health, homelessness, unnecessary institutionalization, and even

death. Plaintiffs have also demonstrated a strong likelihood of success on the merits of their claims that implementation of SB 73 violates the Due Process Clause of the U.S. Constitution; the EPSDT, comparability, sufficiency, and reasonable standards provisions of the Medicaid Act; and the prohibitions on unnecessary institutionalization, discrimination based on type of disability, and discriminatory methods of administration of the Americans with Disabilities Act and Section 504 the Rehabilitation Act. Finally, Plaintiffs have shown that the balance of equities and public interest weigh in favor of granting an injunction to preserve the status quo while the merits of the case are litigated.

NEED FOR PROMPT ACTION

On June 20, 2011, the Governor of California signed into law SB 73, which provides for a 20 percent across-the-board reduction in authorized IHSS hours, subject to certain exceptions, if specified state revenue targets are not met. 3rd RJN, Ex. 1. The reductions are set to take effect on January 1, 2012 if, on or before December 15, 2011, the Director of Finance determines that these targets are not met. Assembly Bill No. 121 (Stats. 2011, c. 41, §§1-2). On November 16, 2011, the state Legislative Analyst issued a report stating that the specified revenue targets would not be met and that under its projections the IHSS reductions provided for in SB 73 would take effect. 3rd RJN, Ex. 7. The same day, the Director of Finance stated that the budget reductions would likely take effect. 3rd RJN, Ex. 8. Plaintiffs learned yesterday that State officials are currently moving to implement the reductions by making programming changes to CMIPS and preparing to send out notices of action. Bird Decl. ¶¶10, 13.

On November 1, 2011, CDSS issued a draft All County Letter ("ACL") explaining how the hours reduction would be implemented. 3rd RJN, Ex. 5. On the evening of November 29, 2011, CDSS issued the final ACL. *Id.*, Ex. 6. Much of the ACL describes how Defendants will implement the "IHSS Care Supplement" process, through which some recipients may apply for partial or full restoration of hours upon a showing of serious risk of out-of-home placement. Cal. Welf. & Inst. Code §12301.07(f). The ACL provides that eligibility for an IHSS Care Supplement is dependent on recipients' functional ranks, which are scores assigned to a recipient's mental functioning or certain activities of daily living. 3rd RJN, Ex. 6. This Court has already determined

that functional ranks are not reasonable measures of need. Order Granting Plaintiffs' Motion for a Preliminary Injunction (Dkt. 198) 12:24-14:5, 17:11-16, 18:6-8. Nor are they reasonable measures of risk of out-of-home placement.

Pursuant to a stipulation and order entered in 2010 staying the instant case pending the appeal of the preliminary injunction, on November 28, 2011 Plaintiffs gave written notice to Defendants of intent to lift the stay and notified Defendants of intent to seek a TRO. Dkt. 319 & Ex. A. Plaintiffs also contacted Defendants to discuss the timing of a TRO. On November 30, 2011, Defendants' counsel informed Plaintiffs that CDSS had already completed the reprogramming of the CMIPS system required to implement the 20% reduction in IHSS hours and would "pull the switch" to put these changes into effect by the close of business on December 1, 2011. Bird Decl. ¶10. According to Defendants' counsel, pulling the switch will also begin the process of printing the physical notices of action that are to be mailed out no later than December 15, and once the re-programming is implemented, reversing any changes after December 1, 2011 would need to be done manually by the counties. *Id.* Defendants' counsel stated that if the Court does not issue a TRO before the close of business on December 1, 2011, CDSS cannot guarantee that the changes can be reversed by January 1, 2012, and that the longer the period of time between December 1 and the date that a TRO or other order is issued, the more difficult it will be to reverse the process. *Id.* ¶¶11-12. Finally, Defendants' counsel stated that Notices of Action implementing the 20 percent reduction could issue before December 15, 2011, as soon as there is a formal announcement that the revenue targets have not been met, thus "triggering" SB 73. *Id.* ¶13. After learning this information, Plaintiffs informed Defendants' counsel that they would request that the Court issue a temporary restraining order today, December 1. *Id.* ¶15

By the terms of the stipulation and order, the stay of proceedings in this case lifted on December 1, 2011, and Plaintiffs immediately filed the instant application for a TRO, motion to amend the complaint, and associated papers. The TRO motion was filed as soon as it reasonably could have been, given that it was uncertain whether the specified revenue targets would be achieved, in which case the IHSS hours reductions would be avoided, until November 16, 2011; that Defendants did not set forth final implementation plans until the evening of November 29,

2011; and that Plaintiffs did not learn that the CMIPS changes would be implemented on December 1, 2011 until the afternoon before, on November 30, 2011.

Plaintiffs need a TRO by 4:00 p.m. on Thursday, December 1, 2011, to ensure that the switch is not pulled to implement the programming changes in the CMIPS system. Plaintiffs also need a TRO to ensure that Defendants do not issue Notices of Action informing 372,000 IHSS recipients that their IHSS hours will be substantially reduced on January 1, 2012. Those notices will cause great stress and anxiety for individuals who depend upon IHSS services to live safely in their homes, and if this Court were to enjoin the reductions after the Notices of Action issue that would require a second set of corrective notices. Because Plaintiffs do not expect that notices will be sent prior to Tuesday, December 6, 2011 (although there is no guarantee), if this Court determines not to enter a TRO today, Plaintiffs alternatively request a TRO no later than December 6, 2011.

RELIEF SOUGHT

Plaintiffs respectfully request that the Court grant Plaintiffs' *ex parte* application for a TRO and order to show cause why a preliminary injunction should not issue, by 4:00 p.m. on Thursday, December 1, 2011. In the alternative, Plaintiffs request a TRO by Tuesday, December 6, 2011, on the following expedited briefing schedule: Opening Brief filed December 1, 2011; Defendants' Opposition Brief due December 5, 2011 at 5:00 p.m.; Plaintiffs' Reply Brief due December 6, 2011 at 12:00 p.m.; and hearing the afternoon of December 6, 2011.

Dated:

Respectfully Submitted,

By: /s/ *Melinda Bird*

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO/OAKLAND DIVISION

DAVID OSTER, *et al.*, Plaintiffs v. WILL LIGHTBOURNE, Director of the California Department of Social Services; TOBY DOUGLAS, Director of the California Department of Health Care Services; CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES; and CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, Defendants	Case No.: CV 09-04668 CW **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF *EX PARTE* APPLICATION FOR TEMPORARY RESTRAINING ORDER** **RELIEF REQUESTED BY 4:00 P.M. TODAY (THURSDAY, DECEMBER 1)**

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiffs seek a temporary restraining order ("TRO") and order to show cause why a preliminary injunction should not issue to enjoin Defendants' implementation of California Senate Bill 73 ("SB 73"), which is set to reduce most In Home Supportive Services ("IHSS") recipients' service hours by 20 percent effective January 1, 2012. The reductions will take effect if the Director of Finance determines that certain specified revenue targets will not be met, which appears virtually certain at this time. Defendants plan to send notices of action to 372,000 elderly, disabled, or blind recipients informing them that their hours will be reduced by 20 percent on or before December 15, 2011. Each of these 372,000 IHSS recipients has been determined by county social workers to need the services he or she currently receives in order to avoid the risk of injury or other harm and live safely at home. Because Defendants intend to implement changes to the statewide IHSS database at the close of business on Thursday, December 1, 2011, Plaintiffs ask that a TRO issue **by 4:00 p.m. today**.

SB 73 provides for a process for recipients who face a serious risk of out-of-home placement to apply for the partial or full restoration of their IHSS hours. However, that process does not cure the legal violations presented by the hours reduction, for many reasons, including:

- All IHSS recipients have been previously individually assessed by county social workers to need their current hourly authorizations in order to remain safely at home, and so hours cannot be reduced without substantial risk of harm and institutionalization;
- SB 73 provides for hours restorations based only on a showing of serious risk of out-of-home placement, rather than considering risk to health;
- With a few narrow exceptions, Defendants are placing the burden on IHSS recipients to apply for hours restorations within a brief time window rather than identifying those at risk of out-of-home placement or deteriorating health without regard to whether the recipient files an application;
- Defendants are using functional rankings as mandatory eligibility screening criteria for hours restorations even though this Court has previously found these rankings are not

reasonable measures of need for IHSS;

- The reductions are being imposed on children under 21 without regard to medical necessity;
- Defendants' notice of action is not reasonably calculated to inform recipients of their right to challenge the reductions, and the notice Defendants will issue if the county denies full hours restoration does not provide recipients sufficient information to challenge the decision.

Plaintiffs seek a TRO enjoining the planned reductions which will otherwise cause immediate and irreparable harm by placing members of the plaintiff class at imminent and serious risk of harm to their health and safety, as well as of unnecessary and unwanted out-of-home placement including institutionalization. The balance of equities strongly favors Plaintiffs because Defendants' only interest is fiscal, whereas the plaintiff class faces life or death consequences.

Plaintiffs are highly likely to prevail on their legal claims. Defendants' failure to provide adequate notice of the reductions violates the federal Due Process Clause. SB 73 also violates the requirements of Title XIX of the Social Security Act, 42 U.S.C. § 1396a ("the Medicaid Act") that States provide (1) services that are sufficient in amount, duration, and scope to reasonably achieve their purposes; (2) services according to reasonable standards ("reasonable standards"); (3) comparable Medicaid services to individuals with similar needs ("comparability"); and (4) medically necessary services to children under 21 ("EPSDT"). And it violates the Americans with Disabilities Act of 1990, 42 U.S.C. § 12312 ("ADA"), and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"), by placing IHSS recipients at imminent risk of unnecessary and unwanted institutionalization; by discriminating on the basis of type of disability; and by using methods of administration that will exclude individuals with disabilities from IHSS.

In 2009, this Court already preliminarily enjoined Defendants from reducing domestic and related services that IHSS recipients had previously been individually assessed to need, based on functional ranks that this Court concluded were not reasonable measures of need. Order Granting Plaintiffs' Motion for a Preliminary Injunction ("PI Order") (Dkt. 198) 12:24-14:5, 17:11-16, 18:6-8. This Court also found that the notices Defendants intended to send did not comply with Due

Proces. *Id.* 24:12-25:24. Defendants' implementation of SB 73 suffers from the same defects this Court found earlier and more: IHSS recipients' authorized hours will be reduced by 20 percent below assessed need, unless recipients *both* have certain specified functional ranks (which this Court has already determined do not reasonably measure need) *and* understand a defective notice and are able to send back a paper requesting hours restoration by a specified date.

An immediate TRO should issue.

BACKGROUND

I. The IHSS Program Provides Necessary Services To Keep Elderly and Disabled People Safely At Home.

A. IHSS Provides Core Services that Recipients Need to Remain Safely at Home.

IHSS is provided through California's Medicaid program ("Medi-Cal") and is funded with a combination of state, county and federal funds. Welf. & Inst. Code § 12306. Recipients are eligible for IHSS if they meet income guidelines and "are unable to perform the services themselves and … cannot safely remain in their homes or abodes of their own choosing unless these services are provided." Welf. & Inst. Code §12300(a). The purpose of the program is "to enable [the] aged, blind or disabled poor to avoid institutionalization by remaining in their homes with proper supportive services." *Miller v. Woods,* 148 Cal.App.3d 862, 867 (Cal. App. 1983); *see also* Cal. Dep't Soc. Servs. ("CDSS"), Manual of Policies and Procedures ("MPP") § 30-700.1 (Exhibit H to RJN (Dkt. 18-8)).

Counties administer the IHSS program. County social workers may authorize hours only based on a "determin[ation] that the recipient would not be able to remain safely in his/her home without IHSS" and "performance of the service by the recipient would constitute such a threat to his/her health/safety that he/she would be unable to remain in his/her own home." MPP §30-761.13-14.[1] Of the 440,000 people who depend on the IHSS program, 60% are seniors.[2] Experts

[1] IHSS services include (1) domestic services (house cleaning); (2) related services - meal preparation and clean-up, restaurant meal allowance, laundry, grocery shopping and other shopping; (3) personal care services - bowel and bladder care, respiration, feeding, routine bed baths, bathing, oral hygiene and grooming, dressing, repositioning and rubbing skin including range of motion exercises, transfers, care and assistance with prosthetic devices and self-administration of medication, routine menstrual care, skin care, ambulation; (4) trave2-24. 1 to medical appointments; (5) yard hazard abatement; (6) protective supervision; (7) teaching and

and county IHSS officials confirm that these seniors are healthier and happier living at home. *See, e.g.,* Altman Decl. (Dkt. 62) ¶4; LaPlante Decl. (Dkt. 85) ¶7; Schnelle (Dkt. 82) ¶¶5, 6; Preis Decl. ¶9; Crain Decl. ¶5; Hathaway Decl. ¶5. People under 65 with disabilities also have better outcomes and experience greater independence and well-being living independently. Gardner Decl. (Dkt. 70) ¶39; 2nd Vescovo Decl. ¶29-31.

IHSS offers assistance with a range of activities of daily living at home, just as Medicaid-funded nursing homes or private board and care facilities provide residents with services in institutions.[3] Assistance with personal care tasks such as bathing, dressing, toileting, and mobility/ambulation are core IHSS tasks. For example, Plaintiff Helen Stern is 86 years old and has limited mobility. She requires assistance to bathe, dress, and walk around in her house. Stern Decl. ¶¶4-10.[4] Many frail elders need similar assistance. *See, e.g.* Izsadore Decl. ¶9. IHSS providers also remind recipients to take prescription medication at the right time and in the right amounts. 2nd Baran Decl. ¶12.[5]

Domestic and related tasks, which include meal preparation, meal clean-up, shopping, laundry, and housecleaning, are also vital components of IHSS that enable recipients to remain safely at home. Wallace Decl. ¶¶22-26; 2nd Hoffacker Decl. ¶4.[6] When balance is poor, help with

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demonstration services, and (9) paramedical services. Welf. & Inst. Code § 12300(b) & (c); *Id.* § 14132.95(d)(1) & (2).

[2] PI Order (Dkt. 198) at 2; *see also* Kline Decl. (Dkt. 31), Ex. C at 8.

[3] *See* Preis Decl. ¶¶4-10 for explanation of services provided by board and care facilities.

[4] *See also*, *e.g.*, 3rd Jones Decl. ¶7, 15 (needs help getting out of bed, dressing, and bathing); Salazar Decl. ¶4 (cannot bathe without provider); Lott Decl. ¶¶5-7 (getting in and out of bed, dressing, and bathing, including bed baths); Cunningham Decl. ¶¶4-5; Hayes Decl. ¶3; Baker Decl. ¶¶5, 21.

[5] *See also*, *e.g.*, Thurman Decl. ¶18 (severely dyslexic consumer cannot read instructions on medication bottles and risks overdose without assistance); 3rd Jones Decl. ¶23; Goff Decl. ¶7 (mentally ill consumer with history of suicide attempts cannot safely keep medications in home); Phillips Decl. ¶6 (paranoid-schizophrenic consumer will refuse to take essential medication or take more than directed unless closely monitored); Swann Decl. ¶6 (mentally disabled recipient forgets medication on weekends when provider not present); Warner Decl. ¶9 (same, and forgets to test blood sugar); Hayes Decl. ¶8 (Alzheimer's); Baker ¶¶8, 24; Salazar Decl. ¶9; 2nd McHenry Decl. ¶4 (needs reminders and likely to forget whether she has taken pills and risk overdose); Wessinger Decl. ¶8 (spills pills without help due to arthritis); Peterson Decl. ¶4; Hutchens Decl. ¶7; Lott Decl. ¶10; Love ¶15; Hylton ¶7.

[6] *See also*, *e.g.*, Stern Decl. ¶¶17, 19 (cleaning presents fall risk); 3rd Jones Decl. ¶¶13-14 (AIDS patient prone to pneumonia and bronchitis if apartment not clean); Maher Decl. ¶5 (emphysema worsened if home not clean); Cooper Decl. ¶8 (low-salt and low-sugar diet due to hypertension and diabetes; cannot cook due to nerve damage in hands); Swann Decl. ¶¶8 (special diabetes diet); Warner ¶10; Hammers Decl. ¶10; Goulet Decl. ¶20; Carpenter Decl. ¶¶8, 11, 16.

cooking and meal clean-up ensures that individuals do not risk a fall, which can trigger a downward spiral that ends in a nursing home. Wallace Decl. ¶¶23-24 (fall may lead to emergency room, then hospital, then institutionalization); 3rd Kaljian Decl. ¶6.[7] Other IHSS recipients need assistance with meal preparation because they have dementia or cognitive impairments. Crain Decl. ¶7.[8] Still others cannot cook on their own due to physical impairments such as severe arthritis, balance problems that create a fall risk, or inability to stand for any length of time.[9] Whatever the reason, IHSS services ensure their safety, continued health, and nutrition. *See., e.g.*.Crain Decl. ¶7 (eating well-balanced diet and staying hydrated essential to health); Gardner Decl. (Dkt. 70) ¶31. This is of special importance when recipients must follow medical restrictions on their diets due to conditions like diabetes, kidney failure, hypertension, or digestive or heart problems. 3rd Kaljian Decl. ¶6; 2nd Marconi Decl. ¶9.[10]

Many elders and people with disabilities can no longer go out into the community on their own, and so rely on IHSS for help with shopping for food, other essential errands, and accompaniment to necessary medical appointments. Crain Decl. ¶9 (clients with chronic illnesses require regular accompaniment to doctor); 2nd Baran Decl. ¶13 (medical appointments).[11] Others depend on help with cleaning and laundry. Those with poor balance and weakness often cannot manage a broom or mop and risk falls if they attempt to clean house themselves.[12] Blind people may need similar assistance.[13] Some have mental disabilities and need direction and reminders to

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[7] *See*, *e.g.*, Thurman Decl. ¶¶10, 19-20; 3rd Jones Decl. ¶9; Hammers Decl. ¶7.

[8] *See*, *e.g.*, Swann ¶8 (wrong diet could lead to coma; has left burner on); Warner ¶10; Baker Decl. ¶¶4, 9 (has strict diabetes diet and Alzheimer's; caught trailer on fire when left burner on); Hayes Decl. ¶5 (Alzheimer's, diabetes and heart disease; does not understand dietary restrictions); 2nd McHenry Decl. ¶7; Cachero Decl. ¶8; 3rd Aho Decl. ¶6; Phillips Decl. ¶8.

[9] *See*, *e.g.*, 3rd Jones Decl. ¶9 (neuropathy; cannot grip cooking utensils); Thurman Decl. ¶19; Stern Decl. ¶13; Cline Decl. ¶9; Hicks Decl. ¶9; Cooper Decl. ¶8; Carpenter Decl. ¶¶6, 8, 9, 16; Wessinger Decl. ¶5; Hayes Decl. ¶5; Baker Decl. ¶9; Salazar Decl. ¶10; Hutchens Decl. ¶8; Lott Decl. ¶11; Cunningham Decl. ¶8.

[10] *See*, *e.g.*, Thurman Decl. ¶19; 3rd Jones Decl. ¶10; Hammers Decl. ¶7; Goulet Decl. ¶¶12-14; Swann ¶8; Warner ¶10; Cline Decl. ¶9; Cooper Decl. ¶8; Carpenter Decl. ¶¶8, 16; Hayes Decl. ¶5; Baker Decl. ¶¶4, 25; Hutchens Decl. ¶8; Lott Decl. ¶11; Cunningham ¶8.

[11] *See*, *e.g.*, 3rd Jones Decl. ¶15; Stern Decl. ¶¶13-14; Hayes Decl. ¶7; Swann Decl. ¶7; Warner Decl. ¶¶14-15; Goff Decl. ¶¶11-12; Phillips Decl. ¶¶7, 9; Cooper Decl. ¶10-11; Carpenter Decl. ¶¶7, 12, 18; Maher Decl. ¶¶8-9; 2nd McHenry Decl. ¶¶9-10; Baker Decl. ¶6; Salazar Decl. ¶¶7-8; Wessinger Decl. ¶7; Hutchens Decl. ¶¶10-11; Lott Decl. ¶13; Cunningham Decl. ¶10.

[12] *See*, *e.g.*, Thurman Decl. ¶¶10, 23; Stern Decl. ¶19; Hayes Decl. ¶4; Baker Decl. ¶¶11, 26; Salazar Decl. ¶11; Hutchens Decl. ¶9; Lott Decl. ¶12; Hammers Decl. ¶10; Goulet Decl. ¶20.

[13] *See*, *e.g.*, Hammers Decl. ¶10; Goulet Decl. ¶20; Thurman Decl. ¶¶7, 10.

clean because of their level of confusion, disorientation, or self-neglect.[14] Cleaning and laundry services are vital to allow individuals to stay safely in their home, particularly those with suppressed immune systems, respiratory ailments, or obsessive compulsive disorders or who have urinary, bowel, or blood issues that would create serious hazards otherwise. *See infra* at 17-18 & n.38. The maximum time allocation for shopping is 90 minutes per week, for laundry 90 minutes per week, and for housecleaning six hours per month, MPP §§30-757.11, 757.134, 757.135.

B. Recipients are Individually Assessed To Receive IHSS Services.

IHSS is administered by counties under the supervision of Defendant CDSS and pursuant to an interagency agreement between Defendant Department of Health Care Services ("DHCS") and CDSS. County social workers conduct an individualized, in person assessment of applicants' eligibility for IHSS services and the amount of services that they need to remain safely in their own home. Welf. & Inst. Code §§ 12300(g), 12302.1, 14132.95(f), 14132.951(b) & (e); MPP §§ 30-761.11-.13, §30-761.24; *Miller*, 148 Cal.App.3d at 868; D'Antonio Decl. ¶¶2-6. Regulations dictate that "[s]ervices shall be authorized only [where] Social services staff . . . has determined that the recipient would not be able to remain safely in his/her own home without IHSS [and] [p]erformance of the service by the recipient would constitute such a threat to his/her health/safety that he/she would be unable to remain in his/her own home." MPP § 30-761.1.

California statutes require that counties determine a person's eligibility (need) for any services by assessing "the recipient's living environment, alternate resources, and their functional abilities." Welf. & Inst. Code § 12309 (a)-(b). While the State has promulgated "hourly task guidelines" as an aid in the assessment process, counties are required to authorize hours outside the guidelines ranges when necessary to meet individual need. Welf. & Inst. Code § 12301.2(a)-(c); Figueroa Decl. (Dkt. 69) ¶6.

C. IHSS is Cost Effective.

IHSS is extremely cost effective, given the comparative costs of out-of-home care. Nursing homes, for example, cost five times as much as services received by a typical IHSS recipient.[15]

[14] *See*, *e.g.*, Aho Decl. ¶¶8-9; 2nd McHenry Decl. ¶6.

[15] Kline Decl. (Dkt. 31), Ex. G at 7. This 2004 report compared the average daily rate for hospitals ($1230), ICF/DD facility ($142), nursing home ($118) and IHSS ($24). *See also* 2nd

Half of all IHSS recipients receive fewer than 80 hours per month.[16] Without adequate IHSS services, many recipients would end up needing to seek more expensive services in emergency rooms and other settings. Gardner Decl. (Dkt. 31) ¶38. Because of its many benefits, Defendants have described IHSS as "an essential component of the State's effort to provide services to maintain individuals [with disabilities] in their homes and communities."[17]

II. Defendants' Implementation of SB 73 Will Cut IHSS Services to Hundreds of Thousands of IHSS Recipients By 20 Percent.

A. SB 73

On June 30, 2011, the Governor signed SB 73. Third Request for Judicial Notice ("3rd RJN"), Ex. 1. Under SB 73, if certain revenue targets are not met (a determination that will be made by December 15, 2011), the hours of most IHSS recipients will be cut by 20 percent, effective January 1, 2012. Cal. Welf. & Inst. Code §12301.07(a).[18] This 20 percent reduction will be in addition to a 3.6 percent reduction in hours for most IHSS recipients effective February 1, 2011. *Id.*, §12301.06. Thus, IHSS recipients' hours will be reduced by almost 25 percent. Recipients may "direct the manner in which the reduction of hours is applied to the recipient's previously authorized services." *Id.*, §12301.07(a)(4).

Under SB 73, recipients who believe themselves at serious risk of out-of-home placement may apply for restoration of the reduced hours; this restoration is called an "IHSS Care Supplement." Welf. & Inst. Code §12301.07(f). Certain recipients may be preapproved for IHSS Care Supplements, and will not receive notices of action ("NOAs"). *Id.*, §12301.07(b), (c). However, 372,000 recipients who are not preapproved will receive NOAs informing them of the hours reduction, which will be sent on or before December 15, 2011. 2nd Keeslar Decl. ¶¶14-16; *Id.*, §12301.07(a)(5); 3rd RJN, Ex. 6.

Recipients who apply for IHSS Care Supplements within 15 days of their receipt of the

Jimenez Decl. ¶¶3-7 (average nursing home cost is $173.34 per day, or approximately $5,200 per month, whereas average monthly cost for IHSS is $890.72 per month); Polit Decl. (Dkt. 81) ¶¶4, 5.

[16] Kline Decl. (Dkt. 31), Ex. C at 7.

[17] CA Health and Human Services Agency, CA Olmstead Plan, Kline Decl. (Dkt. 31), Ex. I at 32, 52 (commitment to increase service capacity for "in-home care").

[18] Individuals who receive IHSS services under certain specified waiver programs will not be subject to the 20 percent reduction. *Id.*, §12301.07(a)(5). CDSS estimates that approximately 55,000 IHSS recipients will be exempt. 2nd Keeslar Decl. ¶¶14-15.

NOA, or before the effective date of the reduction, are eligible for aid paid pending (which means their currently authorized hours will be maintained) until the county rules on their IHSS Care Supplement application. Cal. Welf. & Inst. Code §12301.07(e), (f). If a recipient disagrees with the county's decision, the recipient may file a state appeal. *Id.*, §12301.07(f).

On November 16, 2011, the Legislative Analyst issued a report stating that the specified revenue targets would not be met and that, SB 73 would likely take effect. 3rd RJN, Ex. 7. The Director of Finance must make a formal determination as to revenue targets no later than December 15, 2011. Assembly Bill No. 121 (Stats. 2011, c. 41, §§1-2). Although that formal determination has not yet been made, the Director has indicated that this is a foregone conclusion. 3rd RJN, Ex. 8. As soon as the determination is made, notices of action may issue.

B. Department of Social Services Implementation

On November 2, 2011, DSS issued a draft All-County Letter ("ACL") outlining the steps for implementation of SB 73. 3rd RJN, Ex. 5. The evening of November 29, 2011, DSS issued a final ACL. 3rd RJN, Ex. 6. The draft ACL for the first time proposed (and the final ACL adopted) the use of functional ranks to determine which recipients would be preapproved for IHSS Care Supplements and which recipients would be eligible for discretionary consideration for IHSS Care Supplements. 3rd RJN, Ex. 6 at 3-4, Ex. 7 at 3-4.[19] Under the ACL, recipients with functional ranks below certain levels are categorically ineligible for IHSS Care Supplements – and counties may not approve them – even if they could otherwise show they will be at serious risk of out-of-home placement after the reduction in hours. *Id.* at 3-4. This Court has previously determined that functional ranks are not reasonable measures of individual need. PI Order (Dkt. 198) 12:24-27, 18:6-8; *see also infra* at 10-11. Defendants' use of functional ranks as an eligibility screening mechanism may exclude more than two-thirds of IHSS recipients. Keeslar 2nd Decl. ¶¶14-16.

The ACL requires that, in order to be eligible for consideration for an IHSS Care Supplement, a recipient must "meet[] the criteria as specified in either A or B below:

[19] Under the ACL, individuals with functional ranks of 5 for four specified personal care services (mobility, bowel/bladder/menstrual, transfer, and eating), assessed for 283 hours, or assessed for protective supervision will be preapproved for IHSS Care Supplements. Counties do not have discretion to preapprove individuals who are outside these categories. 3rd RJN, Ex. 6 at 3-4. CDSS estimates 13,000 recipients will be preapproved. 2nd Keeslar Decl. ¶¶14-15.

A. Any three or more of the following conditions are met:
   1. Paramedical Services have been authorized to monitor medical condition and/or give injections;
   2. His/her functional rank for Mobility Inside is either 4 or 5;
   3. His/her functional ranking for Bathing and Grooming is either 4 or 5;
   4. His/her functional ranking for Dressing is either 4 or 5;
   5. His/her functional ranking for Bowel, Bladder or Menstrual is 3, 4 or 5, or Paramedical Services have been authorized for catheter or colostomy care;
   6. His/her functional ranking for Transfer is either 4 or 5, or Paramedical Services have been authorized for bed sore care;
   7. His/her functional ranking for Eating is either 3, 4 or 5; or
   8. His/her functional ranking for Respiration is 5.

B. The sum of his/her functional rankings for Memory, Orientation and Judgment is equal to 7 or greater.

3rd RJN, Ex. 6 at 3-4. If a recipient does not meet the eligibility criteria, a county may not grant full or partial restoration of hours. *Id.* at 3-4. If a recipient does meet the eligibility criteria, the ACL directs that a county social worker determine whether the serious risk of out-of-home placement can be eliminated by assisting the recipient in changing how authorized hours are used, arranging for services from an alternative resource, or partial or full hours restoration. *Id.* at 6-7.

The ACL also imposes a March 1, 2012 deadline for requests for IHSS Care Supplements. *Id.* at 6. Thus, recipients who attempt to make do with the hours reduction but find themselves unable to do so, or whose ability to make do with reduced hours declines, will be ineligible for Care Supplements if they fail to apply by March 1, 2012. County officials predict that many eligible recipients will miss the deadline. 2nd Marconi Decl. ¶13; 3rd Collins Decl. ¶21; Elliott Decl. ¶29; 3rd Kaljian Decl. ¶¶11, 14.

The ACL also includes language for a NOA message and insert to inform recipients of the 20 percent reduction and the IHSS Care Supplement process. 3rd RJN, Ex. 6 at 9-10 & Att. A-B. That NOA message and insert do not outline the eligibility requirements for IHSS Care Supplements or contain information about recipients' functional ranks. *Id.* IHSS recipients have not previously received information about their functional ranks. PI Order (Dkt. 198) 25: 14-19; Elliott Decl. ¶30; 3rd Guerra Decl. ¶10; Smith Decl. ¶13.[20] The NOA also does not specify the

[20] *See, e.g.*, Thurman Decl. ¶32; Stern Decl. ¶26; M.G. Decl ¶17; 2nd Hylton Decl. ¶21.

groups that are exempted from the reduction or that are preapproved for IHSS Care Supplements, or explain to recipients how to appeal if they believe they have received a notice of action erroneously because they should be exempt or pre-approved. 3rd RJN, Ex. 6 at 9-10, Att. A-B. The NOAs will not be translated into languages other than Spanish, Chinese, and Armenian. *Id.*

Also included in the ACL is language for NOAs informing recipients the county has denied their IHSS Care Supplement application. That language does not specify an effective date of the service reduction or inform individuals whether they will receive aid paid pending if they appeal that county denial to the State. 3rd RJN, Ex. 6 at 10-11. Nor does it inform recipients that their application has been denied because of their functional ranks, or set forth their functional ranks.

C. Functional Ranks Above One Are Not Used To, and Could Not Reasonably Be Used To, Measure Need or Risk of Out-of-Home Placement.

Functional ranks for each of 14 activities of daily living ("ADLs") are assigned to IHSS recipients by county social workers. PI Order (Dkt. 198) 3:18-4:3 (listing activities). Some activities, such as self-administration of medication and accompaniment to medical appointments, do not receive functional ranks. *Id.* at 3 n.2. The ADL ranks are defined as follows:

- Rank 1 for those with independent functioning who do not need assistance;
- Rank 2 for those who "needs verbal assistance, such as reminding, guidance, or encouragement";
- Rank 3 for those who need "some human assistance";
- Rank 4 for those who need "substantial human assistance"; and
- Rank 5 for those who cannot physically perform the function at all.

Cal. Welf. & Inst. Code § 12309(d); PI Order (Dkt. 198) 4:4-18. Recipients also receive ranks of 1, 2, or 5 for three categories of mental functioning, with 2 indicating some or moderate impairment and 5 meaning severe impairment is observed. RJN, Ex. D (Dkt. 18-4) at 18-22.[21]

This Court has already found that functional ranks do not "reasonably measure[] the individual need of a disabled or elderly person for a particular service." PI Order (Dkt. 198) 12:24-27, 17:13-16. "[A]ll ranks, two through five, reflect a social worker's determination that IHSS

[21] A rank of 2 for memory signifies moderate or intermittent memory loss, while a rank of 5 indicates severe memory deficit. *Id.* at 19-20. A rank of 2 for orientation means there is occasional disorientation and confusion while 5 indicates severe disorientation that puts the recipient at risk. *Id.* at 20-21. For judgment, 2 means judgment mildly impaired (including poor social judgment), while 5 shows severely impaired judgment. *Id.* at 22.

recipients are 'unable to perform the services themselves' and 'cannot remain in their homes or abodes of their own choosing unless these services are provided.'" PI Order (Dkt. 198) 14:1-5 (citing Cal. Welf. & Inst. Code §12300(a)).[22] As such, "the functional ranks were not intended to, and cannot by their very nature, capture the risk of out of home placement faced by a recipient who receives almost twenty-five percent less hours than a trained social worker has already determined him to need. The two have no relation." 3rd Collins Decl. ¶27.

County officials and experts have identified many problems with Defendants' decision to limit eligibility for Care Supplements to recipients with particular combinations of functional ranks, and explain that many recipients who do not meet this eligibility criteria are in fact at risk for our-of-home placement and/or serious risk to health and safety. 2nd Marconi Decl. ¶14 ("State has taken away the necessary discretion from the county and trained social workers to evaluate clients as individuals and determine their specific degree of risk and hours needed for safety"); 3rd Collins Decl. ¶¶22-32; 3rd Kaljian Decl. ¶15; Elliott Decl. ¶14; 2nd Guerra Decl. ¶8; Wallace Decl. ¶¶28-33. There are "many grey areas, and it is impossible to place someone into a given functional rank with mathematical precision."[23] 3rd Collins Decl. ¶23. *See also id.* ¶¶24-26, 28; Elliott Decl. ¶17; Wallace Decl. ¶32; Benjamin Decl. (Dkt. 133) ¶¶26-27. Care Supplement eligibility requirements do not even consider activities for which there are no functional ranks, such as accompaniment to medical appointments and assistance with medication, and also ignore functional ranks for domestic and related services, even though these are all vital services that are necessary to keep recipients safe at home. 3rd Collins Decl. ¶28; Elliott Decl. ¶15.[24] The requirement that recipients have 4s rather than 3s in most tasks ignores the fact that a trained social

[22] A rank of 1 indicates no need for assistance, and so would make a recipient ineligible for assistance with that task, MPP §30-763.1, but otherwise functional rank has no relationship to eligibility for IHSS hours. PI Order (Dkt. 198) 4:25-26; *see also* MPP § 30-757.1(a)(1) (functional ranks cannot be "sole factor" to determine eligibility or hours); Figueroa Decl. (Dkt. 69) ¶8.

[23] For example, recipients are ranked 3 for transfer if they require "some help," such as "routinely requir[ing] a boost." They are ranked 4 if they are "unable to complete most transfers without physical assistance." RJN, Ex. D (Dkt. 18-4) at 14. What is the difference between someone who cannot get out of a chair without a boost and one who is unable to complete a transfer without physical assistance? 3rd Collins Decl. ¶24.

[24] Ignoring recipients' inability to perform domestic and related tasks such as meal preparation seems to assume that the only out-of-home placement is a skilled nursing facility, and ignores the fact that many recipients may end up in other settings such as board and care facilities. Preis Decl. ¶¶3, 10.

worker has already found the recipient whose rank is 3 to require "some" assistance, and has already authorized fewer hours. 3rd Collins Decl. ¶29; 2nd Marconi Decl. ¶18; 3rd Kaljian Decl. ¶19-20; Calavan Decl. ¶7; Wallace Decl. ¶33. The requirement that recipients have high functional ranks in at least three personal care tasks also fails to take into account that some recipients have critical needs for only a few services. 3rd Collins Decl. ¶28; 2nd Marconi Decl. ¶19.

As this Court already found, functional ranks "are particularly inaccurate measures of the needs of individuals with mental impairments, such as elders with Alzheimer's disease." PI Order (Dkt. 198) 12:28-13:2. That is because "[i]ndividuals with cognitive and psychiatric disabilities frequently require verbal rather than physical assistance" and so will "receive numerical ranks of two rather than three or four." *Id.* at 13:2-5. Those ranks "reflect the nature of the assistance needed, not the severity of the need. Disabled and elderly individuals with numerical ranks of two have no less need for verbal assistance than individuals with severe physical impairments have for physical assistance." *Id.* at 13:6-10; *see also id.* at 13:10-26 (citing, among other sources, 1996 study by Institute for Social Research at California State University).[25] But recipients with cognitive or psychiatric disabilities often have scores of 2 in personal care tasks, and thus will not be eligible for Care Supplements, no matter how serious their risk of deteriorating health or institutionalization. 3rd Kaljian Decl. ¶16; Elliott Decl. ¶19; Izsadore Decl. ¶16; Wallace Decl. ¶32. The State has limited Care Supplement eligibility to recipients who have a 5 for one of the mental functions of memory, orientation, or judgment, meaning that the recipient is in such danger that she cannot be left alone, but county officials and experts explain that recipients with mental functioning ranks of 2, indicating moderate mental impairment, are also at serious risk of out-of-home placement or deterioration of health if their hours are reduced by 20 percent. 2nd Marconi

[25] Recipients with mental disabilities may need verbal cueing or other nonphysical assistance for a variety of reasons that are critical. For example, many people need reminders to eat on a regular basis or to eat appropriate foods, assistance to avoid eating excessive amounts of food, or reminders not to eat food that is contraindicated because of their medical conditions. Gardner Decl. (Dkt. 70) ¶¶30-33; *see also*, *e.g.*, 3rd Jones Decl. ¶12 (AIDS weakens appetite; without encouragement will not eat enough and will risk malnourishment); Cooper Decl. ¶¶8, 14; Carpenter Decl. ¶¶16, 22; Swann Decl. ¶¶8, 11; Warner Decl. ¶10; Hayes Decl. ¶5; *see also* Cachero Decl. ¶¶5, 8 (without reminders to use restroom, developed permanently distended bowels); Love Decl. ¶¶3, 10, 15, 16, 17 (needs reminders for medication; has been hospitalized for wrong dose); 2nd McHenry Decl. ¶5, 11 (needs encouragement to brush and floss her teeth, bathe and get dressed); Schemel Decl. ¶5; Lott Decl. ¶14.

Decl. ¶20-24; 3rd Collins Decl. ¶31-32; 3rd Kaljian Decl. ¶16-18; Elliott Decl. ¶18; Wallace Decl. ¶29; Barsten Decl. ¶12; Izsadore Decl. ¶16. This is especially problematic because the line between moderate and severe cognitive impairment is difficult to discern. Wallace Decl. ¶29. Social workers do not use the rigorous assessment tools necessary to draw this distinction, and independent research has shown unexplained variation by county in social worker evaluation of mental functioning. Wallace Decl. ¶29. Moreover, these functional rankings are not designed to capture mental health issues such as depression, anxiety, or obsessive-compulsive disorder, so recipients suffering from psychiatric disabilities will be ineligible for Care Supplements despite their serious risk of injury or institutionalization. Wallace Decl. ¶¶29-31.[26]

Moreover, children automatically receive ranks of 1 for certain tasks regardless of the severity of their disability. PI Order (Dkt. 198) 15:24-28.[27] They too are less likely to be eligible for a Care Supplement, despite their need for IHSS hours. Elliott Decl. ¶16.

LEGAL STANDARD

"A plaintiff seeking a preliminary injunction must establish that he is [1] likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *American Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter v. Natural Res. Def. Council Inc.*, 555 U.S. 7, 20 (2008)); *Stormans, Inc. v. Selecky*, 571 F.3d 960, 978 (9th Cir. 2009). Requests for preliminary injunctive relief are evaluated on a sliding scale – where plaintiffs have made a strong showing of irreparable harm, they need not make as great a showing with respect to likelihood of success on the merits, and vice versa. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). Plaintiffs meet this test, as here there is both severe irreparable harm and a strong likelihood of success on the merits.

[26] For examples of recipients with serious mental health issues but ranks of 1s or 2s, see, e.g., 2nd Hylton Decl., ¶3; Swann Decl. ¶¶4, 13; Warner Decl. ¶6; Hayes Decl. ¶2; Goff Decl. ¶¶3, 18, 20; Meireles Decl. ¶4; Mills Decl. ¶¶3, 5, 7-8; Phillips Decl. ¶¶11-13; Cooper Decl. ¶¶14, 10-11, 19.

[27] *See* Nicco Supp. Decl. (Dkt. 145) ¶¶11-12, Exs. A-B (children cannot be ranked higher than 1 for eating or bathing until they turn eight); M.G. Decl. ¶11 (6-year-old named plaintiff L.C. automatically ranked 1 for bathing although requires special assistance, and 3 for bowel/bladder despite serious incontinence issues); J.O. Decl. ¶¶1, 20 & Ex. A.

ARGUMENT

I. The Reduction of IHSS Services Will Cause Irreparable Injury, and the Equities and Public Interest Weigh in Favor of a Status Quo Injunction.

The loss of IHSS services will put Plaintiffs at imminent risk of illness, injury, institutionalization, and even death, as well as harm to their family ties, independence and dignity. An injunction should issue to preserve the status quo while the merits are adjudicated.

A. The Reduction of IHSS Services Will Place Recipients at Great Risk of Injury at Home, Deterioration of Health, and Institutionalization.

1. Risk of Injury and Effect on Health and Safety

The irreparable injury from the reduction of IHSS services will be severe. This Court has recognized, in relation to different reductions and eligibility terminations imposed by ABX4 4, that reductions in IHSS services cause irreparable injuries.[28] PI Order (Dkt. 198) 26:19-27:1.

This 20 percent reduction will cause such irreparable injury here. County social workers have been carefully trained to assess recipients for only the bare minimum number of hours needed for recipients to remain safely at home; thus, cutting 20 percent of these already minimal hours is a virtual guarantee that recipients will not be safe in their homes. Marconi Decl ¶¶5-9; 3rd Kaljian Decl. ¶5; Cotrell Decl. ¶¶4-5; 3rd Collins Decl. ¶¶9-10; D'Antonio Decl. ¶¶3-8; Hathaway Decl. ¶12, 23; Smith Decl. ¶¶7-8; 3rd Guerra Decl. ¶8; Elliott Decl. ¶6; Izsadore Decl ¶¶6-8.[29] County officials predict that the 20 percent reduction in hours will lead to deteriorating health and injury for a huge number of recipients who do not receive a Care Supplement (either because they are ineligible or because they fail to timely apply). Cotrell Decl. ¶5 (cut "is not sustainable, and will cause many [recipients] to suffer deteriorating health or injury"); 3rd Kaljian Decl. ¶6 (predicting "serious decline in both physical and mental health…there will be increased hospitalization and use

[28] ABX4 4 would have terminated some IHSS recipients from eligibility altogether, and would have eliminated certain domestic and related services for some recipients who would have maintained eligibility. PI Order (Dkt. 198) at 7:16-22. The loss of domestic and related services would have imposed hours reductions comparable to those involved here. *See infra* at 37 n.72.

[29] Indeed, many social workers' hours determinations are scrutinized by quality review staff, to make absolutely certain only the minimum hours necessary for a given task are authorized. Bargsten Decl. ¶¶3-4; Izsadore Decl. ¶7; Cotrell Decl. ¶¶8-9 (20 percent reduction in hours will hit Contra Costa particularly hard because county has already initiated stringent individualized assessment process, resulting in 8 percent reduction in hours and savings to State of $1.8 million).

of emergency rooms"); Elliott Decl. ¶¶7-8 (predicting "health deterioration and increased hospitalization," more emergency room admissions and referrals to Adult Protective Services). Independent researchers at UCLA similarly found that recipients will "eat less often, let their homes become less safe, and allow their medical conditions to worsen." Wallace Decl. Ex. B at 7. And once physical and mental deterioration occurs, it is usually irreversible. *Id.* ¶20. Other directors of IHSS Public Authorities and social service agencies report similar dire predictions. 2nd Hoffacker Decl. ¶8 ("outcomes will be severe and irreversible"); Smith Decl. ¶¶ 7-8 ("Many of these recipients will be living in fear in their own apartments. … For many recipients, neglect of any one condition or task could send them spiraling downward, or necessitate a trip to the ER."); Calavan Decl. ¶5 ("pose a risk to … life, health, safety and independence"); 2nd Baran Decl. ¶14 ("health and living conditions to spiral downward"); 3rd Guerra Decl. ¶8 ("devastating impact"); 2nd Vescovo Decl. ¶3 ("risk of infection, illness, serious injury, or even death or suicide"); Preis Decl. ¶3 ("imminent risk of hospitalization"); Crain Decl. ¶5 ("life expectancy would be reduced").

Officials responsible for county IHSS services or public authorities, social workers, and agency heads have reviewed their cases and found many examples of individuals who are not eligible for supplemental care, but for whom the 20 percent reduction imposes a serious risk to health or safety if they remain in their own homes. D'Antonio Decl. ¶¶17, 18, 19, 20; 3rd Kaljian Decl. ¶20; 2nd Baran Decl. ¶15; 3rd Guerra Decl. ¶¶11-14; Elliot Decl. ¶¶20-23; 3rd Collins Decl. ¶¶11-12. Quite simply, the deep hours reduction "puts the most vulnerable members of the public at great risk, and represents the difference between being safe or not safe for the vast majority of IHSS clients." 3rd Collins Decl. ¶8.

IHSS recipients will be forced to make impossible choices: "Do I sit for a longer time in a dirty diaper, or do I sit around in my housecoat all day and not get dressed at all? Do I try to perform services that should be performed by my provider, such as cleaning, and risk falling and harming myself, or do I allow my home to gradually grow more filthy and unhygienic? Do I bathe less often, exacerbating skin conditions? Or do I instead try to shower alone and risk falling because my provider is here less frequently or for fewer hours? Do I forgo medical appointments because my provider doesn't have time to take me to them? Should I cut down on meal

preparation and rely on frozen or processed food that is not compatible with my medically-indicated diet?" Marconi Decl. ¶9; *see also* 3rd Collins Decl. ¶11-12; 3rd Kaljian Decl. ¶6; Elliott Decl. ¶7.[30] In some cases, these recipients lack decision-making abilities, and may not make the most appropriate or safe choice. 3rd Collins Decl. ¶¶11-12; Wallace Decl. ¶¶21, 27. For example, one recipient plans to skip her evening meal. 3rd Guerra Decl. ¶11.[31] In most cases, there is no appropriate choice, because every authorized hour is needed. 3rd Collins Decl. ¶12.

Recipients are likely to become malnourished from eating insufficient food or to suffer the health consequences of eating packaged processed meals that are contraindicated by medically necessary diets (to the extent prepared food is even affordable on their limited budgets) as they struggle to get by with fewer hours allocated to shopping, meal preparation, and meal cleanup. Crain Decl. ¶¶7-8 ("risk of dying"); D'Antonio Decl. ¶¶7, 18; Bargsten Decl. ¶7; 2nd Hoffacker Decl. ¶¶5-6. 2nd Hathaway Decl. ¶¶19, 20; 3rd Kaljian Decl. ¶6; 2nd Vescovo Decl. ¶14; 2nd LaPlante Decl. ¶16; Izsadore Decl. ¶13.[32] Experts agree that reductions in meal preparation services "could have disastrous effects on [recipients'] health." Wallace Decl. ¶25. For example, Named Plaintiff Dottie Jones' AIDS and neuropathy prevent her from using her hands or walking more than a few steps. 3rd Jones Decl. ¶3-5. She is completely unable to prepare food for herself; she cannot even reheat food in the microwave because of the danger of falling or burning herself lifting out a hot plate. 3rd Jones Decl. ¶8. Dottie frequently develops mouth infections that make eating difficult, has a poor appetite because of AIDS, and needs nutritious food due to her compromised immune system. 3rd Jones Decl. ¶¶9-10. If she goes without sufficient shopping and meal preparation services she is likely not to eat, to get sick, and to be rushed to the emergency

[30] For examples of declarations discussing difficult choices consumers face, see, e.g., Thurman Decl. ¶27; 2nd Hylton Decl. ¶18; Hammers Decl. ¶11; Moreno Decl. ¶¶15, 16.

[31] Swann Decl. ¶4; Warner Decl. ¶6; Aho Decl. ¶¶5-6; Goff Decl. ¶3; Meireles Decl. ¶4.

[32] *See also*, *e.g.*, Moreno Decl. ¶¶7, 12, 15 (diabetes, high blood pressure, high cholesterol and kidney failure require special diet including minimum calories and maximum liquid intake; frozen or processed foods will aggravate conditions); Milian Decl. ¶¶5, 6; Hammers Decl. ¶¶7, 11 (diabetes); Hayes Decl. ¶9; Wessinger Decl. ¶10 (cardiovascular disease); Salazar Decl. ¶16 (diabetes); Baker Decl. ¶30 (diabetes); Goulet Decl. ¶¶12-14; Uriarte Decl. ¶9 (high blood pressure and high cholesterol); Ramirez Perez Decl. ¶¶13, 14; Gonzalez Decl. ¶¶4, 5, 6, 16 (special diet due to intestine rupture, stomach lining problems, diabetes and high blood pressure; frozen or processed foods will aggravate); Phillips Decl. ¶8; Cooper Decl. ¶14 (diabetes); Cline Decl. ¶13; Woods ¶7 (diabetes).

room. 3rd Jones Decl. ¶¶17, 18. Other recipients risk choking if their provider is not there to monitor their eating. 3rd Guerra Decl. ¶13. Some with developmental disabilities will make extremely unhealthy food choices (i.e. bags of Cheetos for meals). 3rd Guerra Decl. ¶14.[33]

Many recipients are at great risk of falling and breaking bones if they attempt to perform necessary tasks (such as cleaning or laundry) that they are not physically capable of doing safely, because their provider no longer has time. 3rd Kaljian Decl. ¶6; D'Antonio Decl. ¶15-19; Elliott Decl. ¶7; Wallace Decl. ¶¶23-24.[34] Some are at a fall risk when they attempt to bathe or dress alone. Marconi Decl. ¶23.[35] Falls are among the leading causes of injuries among older adults; in 2007 alone, over 1,400 California seniors died due to injuries from falls and over 67,000 more were hospitalized. Wallace Decl. ¶24; 3rd Guerra Decl. ¶11 (elderly recipient hospitalized and then in nursing home after fall).[36] Other recipients may endanger themselves trying to cook without help, risking a house fire, burn, or knife cut. D'Antonio Decl. ¶16, 19; Vescovo Decl. ¶10-15 (individuals lacking coordination scalded just pulling hot dish from microwave).[37] Reduction in

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[33] *See*, *e.g.*, Love Decl. ¶¶13, 16; McHenry Decl. ¶7; Carpenter Decl. ¶22.

[34] Thurman Decl. ¶¶10-11, 27-28 (cannot clean home safely and may injure selves attempting to bathe, cook, dress, or clean; suffer frequent falls that have caused broken bones); Stern Decl. ¶19 (has fallen and been unable to get up when tried to clean); 2nd Hylton Decl. ¶¶6, 9 (many previous broken bones from falls; relies on walker and cannot clean herself); White Decl. ¶9 (many previous broken bones; has fallen when trying to clean home); Hammers Decl. ¶10; Goulet Decl. ¶20; Uriarte Decl. ¶¶10, 13; Ramirez Perez Decl. ¶¶11, 14; Carpenter Decl. ¶¶5, 10, 17 (history of falls and bone fractures); Wessinger Decl. ¶10 (hospitalized due to falls); Hutchens Decl. ¶15; Gonzalez Decl. ¶¶13, 16 (falls if provider not present; wounds heal slowly due to diabetes); Lott Decl. ¶21.

[35] Thurman Decl. ¶11 (has fallen when attempted to shower alone); 2nd Hylton Decl. ¶14 (cannot shower without assistance; two prior falls have broken bones); Carpenter Decl. ¶¶5, 14 (immunosuppressed consumer with history of falls and bone fractures needs showers due to urinary incontinence); Uriarte Decl. ¶5, 6 (has fallen while dressing; will not shower without assistance); Hammers Decl. ¶¶ 6, 10; Goulet Decl. ¶¶8, 20; Hayes Decl. ¶3; Baker Decl. ¶¶5, 30; Salazar Decl. ¶¶4, 15; Hutchens Decl. ¶6; Lott Decl. ¶7; Cunningham Decl. ¶5; J.O. Decl. ¶9.

[36] Declarants in this case have suffered serious consequences, including broken bones and hospitalization, from falls. 2nd Hylton Decl. ¶¶6, 14; Baker Decl. ¶¶4, 13, 23; Hayes Decl. ¶¶2, 11; White Decl. ¶9; Hutchens Decl. ¶¶3, 15.

[37] Thurman Decl. ¶¶19, 27 (blind consumer with neuropathy could easily cut himself; wife burned self badly while attempting to cook); 3rd Jones Decl. ¶9 (even use of microwave presents risk of burns); Baker Decl. ¶9 (set trailer on fire cooking); Gonzalez Decl. ¶5 (burned self while cooking because blind); 2nd McHenry Decl. ¶7 (burned herself and left burners on, risking fire); Hammers Decl. ¶7 (blind; cannot safely use kitchen items such as knives); Phillips Decl. ¶17 (paranoid-schizophrenic; risks fires through excessive microwave time setting); Goulet Decl. ¶14 (left stove burner on); Swann Decl. ¶8 (same); Love Decl. ¶16 (similar risk); Warner Decl. ¶10 (similar); Wessinger Decl. ¶10 (burn or cut risk); Lott Decl. ¶21 (burn or fall risk); Milian Decl. ¶5 (fire risk).

cleaning services may also lead to homes that are unlivable health hazards, which are particularly dangerous for those with COPD (emphysema) or weakened immune systems, pose extra risks for individuals with incontinence, and may also result in eviction and/or out of home placement. Calavan Decl. ¶6; Izsadore Decl. ¶14; 2nd Baran Decl. ¶17-18.[38]

Recipients who change clothes less often or bathe less will be at risk for pressure sores or other infections. 2nd Vescovo Decl. ¶5; 2nd LaPlante Decl. ¶10; 2nd Hoffacker Decl. ¶7 (pressure sores from not bathing prior to receipt of IHSS services; moved into board and care after 3.6% cuts because of relapse); 3rd Guerra Decl. ¶12 (chronic urinary tract infections from improper hygiene).[39] Being clean and well-groomed is essential to recipients' mental health, and those who can't get their hair brushed or have assistance showering may be less likely to leave their homes, leading to depression. 2nd Vescovo Decl. ¶16.[40] Recipients who need assistance toileting will suffer adverse consequences including accidents as well as dehydration from reduction of fluid intake to avoid having to use the restroom when their provider is not present. 3rd Guerra Decl. ¶12.[41] Recipients may be changed less frequently and forced to remain in soiled pull-ups which

[38] For consumers with health conditions that would be aggravated by loss of domestic services, see Thurman Decl. ¶¶7, 9, 23, 27 (COPD; respiratory conditions deteriorated after no cleaning for several days); 2nd Hylton Decl. ¶9 (COPD/emphysema); 3rd Jones Decl. ¶14 (AIDS, prone to bronchitis and pneumonia); Maher Decl. ¶¶3, 5 (emphysema); Hayes Decl. ¶¶2, 6 (asthma and emphysema); Baker Decl. ¶¶4, 10, 22 (asthma, emphysema, and partially removed lung); White Decl. ¶9 (asthma); Carpenter Decl. ¶11 (AIDS and asthma). For those facing eviction risk, see 2nd Hylton Decl. ¶¶10, 15, 18; Aho Decl. ¶¶ 8-9, 14; Love Decl. ¶¶20, 28; *see also* Bargsten Decl. ¶7 (urinary, bowel, or blood issues); 2nd McHenry Decl. ¶¶6, 16-17 (lack of cleaning worsens depression); Baran Decl. ¶17 (recipients with obsessive compulsive disorders) ; Stern Decl. ¶¶6, 8, 17, 19; Warner ¶¶5, 7-8, 12, 16 Salazar Decl. ¶5; Wessinger Decl. ¶10; Lott Decl. ¶9; Cunningham Decl. ¶6; Swann Decl. ¶5; Mills Decl. ¶12.

[39] Stern Decl. ¶¶6, 8-10, 20, 22 (urinary incontinence and skin problems including open lesions requiring skin grafts; will be unable to reliably shower and regularly change soiled clothing and pull-ups); Goff Decl. ¶¶4-5, 15 (urinary incontinence and skin problems; provider will reduce frequency of cleaning and laundry); Meireles Decl. ¶¶5-6, 12 (urinary incontinence, skin problems, and shower phobia; less frequent washing); Warner Decl. ¶¶7-8, 18 (frequently soils clothing with blood and feces and does not change clothes or bathe regularly); White Decl. ¶13 (urinary incontinence and weakened immune system; less frequent showers risks urinary infection); Carpenter Decl. ¶5 (urinary incontinence; decreased bathing frequency risks urinary infections); Hayes Decl. ¶10 (potential rashes due to incontinence); Baker Decl. ¶¶13, 29 (same); Ramirez Perez Decl. ¶¶15, 17 (risks rashes and skin irritation).

[40] *See also*, *e.g.*, Salazar Decl. ¶15; Baker Decl. ¶30; Lott Decl. ¶20.

[41] *See*, *e.g.*, M.G. Decl. ¶16 (child would risk contracting infections or ripping feeding device if attempted to use toilet unassisted); Cachero Decl. ¶¶5, 8 (mentally ill consumer will not go to bathroom without reminders, which has caused bowel impactions and permanent bowel distention, and will lie in bed after wets it); 3rd Jones Decl. ¶22 (needs help getting to and from

can cause skin outbreak, Stern Decl. ¶20, repositioned or able to get out of bed less often, *id.*; 3rd Jones Decl. ¶7, receive crucial foot care less frequently, Hicks Decl. ¶¶4, 15; Lott Decl. ¶17. Providers rushing through personal care tasks may injure either the recipient or themselves. Izsadore Decl. ¶9-12; Bargsten Decl. ¶¶8-9 (risk if provider rushes through bathing).[42] Many tasks simply cannot be rushed. Izsadore Decl. ¶¶9-12 (assistance to and on the toilet, bathing, brushing teeth, clipping nails, shaving, skin rubbing); M.G. Decl ¶¶7, 15 (use of feeding pump). For example, there are no time-for-task guidelines for paramedical tasks, because these take whatever length of time is prescribed. MPP §30-797.19.

It is also likely some providers will eliminate the time spent taking recipients to medical appointments, because they are not paid for waiting during an appointment, and are unlikely to continue to provide this free service. D'Antonio Decl. ¶10; *see also* 3rd Kaljian Decl. ¶6; Peterson Decl. ¶¶6, 11; Carpenter Decl. ¶7. Even those providers who continue to provide the service will likely need to reduce time in this area,[43] or may not be able to accommodate all scheduled appointments because of the need to juggle other clients. G. Thompson Decl. ¶9. The consequences of missed medical appointments can be dire. Crain Decl. ¶9 ("grave cost to their health"); 3rd Guerra Decl. ¶11.[44]

For individuals with psychiatric disabilities, the stress of losing services may trigger symptomatic behaviors such as hurting themselves. Gardner Decl. (Dkt. 70) ¶¶36-37. Such individuals also have a problem with self-neglect, and must be reminded on a daily basis to get out of bed, bathe, and eat. Without a provider to assist them daily, or sometimes twice a day, their conditions will quickly deteriorate due to malnutrition, lack of hygiene, or lack of movement. 2nd

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bathroom; could have accident without provider help); Lott Decl. ¶8 (some days needs to be lowered down onto toilet).

[42] *See also*, *e.g.*, Ramirez Perez Decl. ¶7 (needs thorough drying after showers, or risks developing irritation or sores due to diabetes); Gonzalez Decl. ¶8 (similar); Stern Decl. ¶9.

[43] Stern Decl. ¶¶14, 20; Swann Decl. ¶¶7, 11; Warner Decl. ¶¶15, 18; Carpenter Decl. ¶7; Hammers Decl. ¶¶9, 11; Goulet Decl. ¶18.

[44] *E.g.*, 2nd Hylton Decl. ¶15 (possible mental relapse, has previously led to homelessness); Maher Decl. ¶9 (almost daily medical appointments are keeping him alive); Milian Decl. ¶8 (risks mismanagement of diabetes, kidney failure, and heart); Warner Decl. ¶18 (aggravate psoriasis, diabetes and mental health issues).

Baran Decl. ¶14-15.[45]

Each authorized hour is necessary to keep vulnerable recipients safe at home, and there is no realistic way to cut around the edges of a 20 percent reduction. Plaintiffs have submitted declarations concerning over 30 recipients who are not eligible for a Care Supplement, who describe in minute detail the time it takes for their provider to perform each task, why that task is necessary for their health and well-being, and why they cannot safely perform that task themselves. There is no room to cut. The effect of the cuts "may not show themselves immediately, but over time people will be sicker and more likely to need intensive medical services because of the reductions to their IHSS hours." 2nd Vescovo Decl. ¶5.

Experts agree that insufficient in-home care hours may lead to adverse health consequences and even death. Dr. Mitchell LaPlante, a UCSF expert on health, disability, and long term care, explains that "A 20 percent reduction of care hours would result in actual care hours falling well below the individually assessed level of personal care hours required to live safely and healthily and is of sufficient magnitude that it is likely to result in unmet needs and an increase in the many adverse consequences that are documented" in scholarly research to result from unmet need, including death, hospitalization, and depression. 2nd LaPlante Decl. ¶21, 11-15. UCLA researchers agree. Wallace Decl. ¶20 & Ex. B at 7-8 (deteriorating medical conditions and increased use of emergency rooms and hospitals). UCSF researchers determined that elderly and disabled individuals with insufficient help with personal care services experienced hunger, weight loss, dehydration, and injuries due to falls, burns, and bedsores. 2nd LaPlante Decl. ¶7. Researchers have also found that domestic and related services, such as meal preparation and clean-up and general cleaning services, are absolutely necessary to keep recipients safely at home. Wallace Decl. ¶¶22-26; 2nd LaPlante Decl. ¶16.

In addition, some recipients may lose their providers altogether. Many providers will quit

[45] 2nd Hylton Decl. ¶18 (would fall into deep depression, shut self in bedroom and not eat or bathe due to stress over cuts); Meireles Decl. ¶¶4 (may increase suicidal tendencies); Goff Decl. ¶¶3, 16 (past suicide attempts; will feel isolated, anxious and depressed); 2nd McHenry Decl. ¶12 (when depression is bad will stay in bed and forego hygiene or eating; regular provider prevents); Lott Decl. ¶¶22 (mental health could deteriorate; history of suicidal and homicidal thoughts); Phillips Decl. ¶¶ 4-5 (paranoid-schizophrenic; will not change clothes or bathe).

after a 20 percent reduction in income (and in some cases loss of health insurance).[46] In some counties there is already a provider shortage and it may be impossible to replace a provider. 3rd Collins Decl. ¶ 13 (San Luis Obispo); 2nd Hathaway Decl. ¶15-18 (Alpine, Modoc, Amador).[47] Even if new providers are found, the break in continuity of care may be devastating for some. Cotrell Decl. ¶11; 3rd Collins Decl. ¶13; G. Thompson Decl. ¶11; Smith Decl. ¶12 (predicting "tragic results. These are not people who can go totally without vital services such as meal preparation for one, two, or three weeks"); Elliott Decl. ¶9 (clients "completely destabilized" when providers quit); Crain Decl. ¶6 (elder lay on floor for three days with broken hip when provider schedule disrupted).[48]

The problem of providers quitting is particularly acute for recipients already authorized for relatively few hours—it will not be worth a provider's time to travel to that recipient for just a few hours (commute is unpaid). D'Antonio Decl. ¶12; Bargsten Decl. ¶10; Lopez Decl. ¶¶4-10; Smith Decl. ¶11; 3rd Guerra Decl. ¶25; Elliott Decl. ¶10.[49] This has a disproportionate effect on recipients with mental illness because they often have lower hours. G. Thompson Decl. ¶10. Providers are also more likely to refuse to serve clients with high personal care needs, who may require more care than is authorized on some days due to bowel/bladder accidents and other unpredictable occurrences. Bargsten Decl. ¶10.

Family members who can no longer afford to stay at home and care for a relative with the reduced hours may resort to unsafe tactics, such as asking a neighbor to look in on a family

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[46] Cotrell Decl. ¶11; 2nd Hathaway Decl. ¶15; 3d Collins Decl. ¶¶12-15; Smith Decl. ¶9-12; 3rd Guerra Decl. ¶26; Elliott Decl. ¶9; Calavan Decl. ¶8; 2nd Vescovo Decl. ¶19, 21. *See also, e.g.*, 3rd Jones Decl. ¶16; Aho Decl. ¶16; Hammers Decl. ¶12, M.G. Decl. ¶12; Goulet Decl. ¶22-23; Cachero Decl. ¶¶14-15; Love Decl. ¶¶22, 23; Cline Decl. ¶14; Woods Decl. ¶8; Guerin Decl. ¶9; White Decl. ¶16; Carpenter Decl. ¶19; Moreno Decl. ¶17; 2nd Jimenez Decl. ¶¶8-10 & Ex. H (explaining loss of health insurance); Voice Decl. ¶6 (same). Providers without health insurance are more likely to have health-related absences, further harming their clients. 3rd Guerra Decl. ¶26; Calavan Decl. ¶8.

[47] *See also* 3rd Jones Decl. ¶16 (small town with few IHSS providers); Moreno Decl. ¶18; Hayes Decl. ¶10; Baker Decl. ¶15.

[48] *E.g.*, Phillips Decl. ¶19 (unfamiliar provider may not identify altered states of mind in paranoid-schizophrenic consumer, preventing essential medication reassessments); Carpenter Decl. ¶22 (provider has helped consumer address phobias and unhealthy eating habits, progress may be lost with new caregiver, diabetic consumer has overcome anxiety and adopted healthy eating habits); Cooper Decl. ¶¶8, 10, 15.

[49] *See also*, *e.g.*, 3rd Jones Decl. ¶16; Woods Decl. ¶8; Cline Decl. ¶14; Carpenter Decl. ¶19; Moreno Decl. ¶18; Aho Decl. ¶17.

member with dementia who cannot be safely left at home. 2nd Vescovo Decl. ¶17. Relatives will be forced to hire strangers to care for their loved ones. Calavan Decl. ¶8. For example, Named Plaintiff L.C. has a very complicated paramedical regime, and her doctor has told her mother that L.C. is in grave danger if others attempt to perform the tasks that her mother currently performs as her provider. M.G. Decl. ¶13-14. But the 20 percent reduction in family income will force her mother back into farm work with her father to support the family, and L.C. will likely be left with relatives who are unable to perform all necessary tasks. ¶12-13.[50] "[I]ncreased pressure on relatives to provide more unpaid care will increase stress, abuse and neglect." Calavan Decl. ¶6.

Even when providers don't quit, they will likely need to reduce the frequency of their visits: For example, a provider who assists a recipient four days a week for three hours a day will probably not be willing to continue to assist that recipient four days a week for just over two hours, and is more likely to reduce the frequency of assistance to three days a week, leaving the recipient to go without a provider for a two day stretch every week. 3d Collins Decl. ¶14; *see also* D'Antonio Decl. ¶13; Smith Decl. ¶10; 3rd Guerra Decl. ¶24; 2nd Vescovo Decl. ¶20.[51] A UCLA Public Health professor explains, "for most recipients, every additional day without care increases the risk of falls, mismanaged medications, missed meals, or other problems." Wallace Decl. ¶18 (describing senior forced to move into nursing home as a result of injecting himself with wrong type of insulin on day his provider was not there). "There are clients who rely on their providers to make sure that they take necessary medications every day, or eat every day. These clients cannot get by on fewer days of service." 3rd Collins Decl. ¶14; *see also* D'Antonio Decl. ¶13. For example, the provider for Named Plaintiff Charles Thurman and his wife currently assists them three to four hours per day, five days a week. Thurman Decl. ¶6. When their combined hours are reduced by 3.4 hours per week, their provider will have to work fewer days, leaving the Thurmans alone three days a week. *Id.* ¶24. They will have no choice but to attempt to cook and move about their mobile home with less assistance, thus risking falls and burns, as has occurred in the past in

[50] *See also* Phillips Decl. ¶17-18; Guerin Decl. ¶¶11, 24; J.O. Decl. ¶¶17, 19.

[51] *See also*, *e.g.*, Stern Decl. ¶20 (provider will come once instead of twice per day); Thurman Decl. ¶24 (four instead of five days per week); Uriarte Decl. ¶¶5, 6, 9, 12 (five instead of six days; consumer cannot get dressed, bathe self or eat proper meals when provider not present); 2nd McHenry Decl. ¶13; Schemel Decl. ¶9; Baker Decl. ¶¶12, 28.

the absence of a provider. *Id.* ¶25.[52]

Alternate services will not make up for the loss of IHSS services. Cotrell Decl. ¶12 (Contra Costa); 2nd Hoffacker Decl. ¶6 (Los Angeles); 2nd Vescovo Decl. ¶23 (Los Angeles) Elliott Decl. ¶¶11-12 (San Francisco); Collins Decl. ¶33-35 (San Luis Obispo); Marconi Decl. ¶11 (San Joaquin); 3rd Kaljian Decl. ¶7-8 (Sonoma); 3rd Guerra Decl. ¶19 (Nevada, Plumas, Sierra); 2nd Hathaway Decl. ¶6-7 (Alpine); 2nd Rosene Decl. ¶¶11-13 (Regional Centers will not be able to fill the gap for their clients); ; Danneker Decl, ¶ 10-11 (same); Elliott Decl. ¶12 (same).[53] Most counties have waiting lists for meal delivery programs, and/or limit such services to seniors. Cotrell Decl. ¶12; 3rd Collins Decl. ¶35; Marconi Decl. ¶11; 3rd Guerra Decl. ¶18; Elliott Decl. ¶11; 3rd Jones Decl. ¶17; Uriarte Decl. ¶14; Love Decl. ¶25. The State has cut a variety of related programs. Wallace Decl. ¶19. And county social workers have no time to help IHSS recipients to locate alternate resources, even if they did exist. 3rd Guerra Decl. ¶21. IHSS recipients are by definition financially needy and cannot afford to replace lost IHSS services by hiring providers on their own, taking cabs to doctor's appointments, paying for grocery delivery, or purchasing expensive pre-made meals. Calavan Decl. ¶4; Crain Decl. ¶11.[54] They are already choosing among covering expenses for shelter, food, medication, and/or clothing. Calavan Decl. ¶4.

2. Risk of Institutionalization

As this Court previously found in relation to the eligibility and services reductions that would have been imposed by ABX4 4, the loss of IHSS services will lead to "a severe risk of unnecessary institutionalization," which itself will cause recipients "'to suffer injury to their mental

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[52] *See also*, *e.g.*, Stern Decl. ¶20 (consumer will remain in dirty pull-up in morning or be unable to put on pull-up at night, risking complications from skin issues); 2nd McHenry Decl. ¶15 (oral hygiene would deteriorate); Hayes Decl. ¶¶9-10 (rashes due to incontinence, forget to take medications); Baker Decl. ¶¶13-14, 29-30 (similar); White Decl. ¶¶12, 13 (consumer may not eat and would reduce showers, which could lead to infection); Gonzalez Decl. ¶16 (cannot bathe, get needed massages, or dress, and falls more frequently); *supra* at 17 & nn.34-37 (fall risk).

[53] *See also* Thurman Decl. ¶29; Stern Decl. ¶21; Aho Decl. ¶¶8-9, 18; Phillips Decl. ¶21; Carpenter Decl. ¶23; Maher Decl. ¶12; McHenry Decl. ¶18; Schemel Decl. ¶13; Wessinger Decl. ¶12; Hayes Decl. ¶12; Baker Decl. ¶¶16, 33; Salazar Decl. ¶21; Hutchens Decl. ¶16; Lott Decl. ¶24; Hicks Decl. ¶¶5, 15; Hammers Decl. ¶13; Cline Decl. ¶15; Love Decl. ¶24; Moreno Decl. ¶19; Guerin Decl. ¶5; Gonzalez Decl. ¶17; White Decl. ¶17; J.O. Decl. ¶19.

[54] *See also* 3rd Jones Decl. ¶17; 2nd Hylton Decl. ¶¶10, 13; Guerin Decl. ¶¶8, 11; Milian Decl. ¶8; Maher Decl. ¶12; Hayes Decl. ¶9; Hicks Decl. ¶12; Warner Decl. ¶14; Carpenter Decl. ¶22.

and physical health, including a shortened life, and even death for some ….'" PI Order (Dkt. #198) at 28:1-4 (quoting *Crabtree v. Goetz*, 2008 WL 5330506, at *30 (M.D. Tenn.)).

County officials predict many IHSS recipients will be unnecessarily institutionalized due to the 20 percent reduction. For example, in Contra Costa County alone, it is estimated that 200-400 recipients will go in nursing homes within the next six months to a year, with countless others being forced into board and care facilities. Cotrell Decl. ¶10. This will only grow worse over time. "[S]ome IHSS clients whose hours are reduced by twenty percent will deteriorate rapidly and end up in a nursing home or other facility within a matter of months; many more will suffer out-of-home placement in a year, and still more will be institutionalized within two years, as their conditions gradually deteriorate due to lack of adequate care." Cotrell Decl. ¶7. Other county officials and agency heads make similar predictions. Elliott Decl. ¶7 ("Some clients will decompensate or deteriorate quickly and require near immediate institutionalization, while others will suffer a more gradual decline"); Smith Decl. ¶8 ("For these vulnerable and alone recipients, a trip to the hospital is often the end of independence, as deteriorating health or injury may lead to unwanted out-of-home placement"); 3rd Collins Decl. 10; Marconi Decl. ¶5 ("serious and immediate risk of out-of-home placement"); Calavan Decl. ¶5; 2nd Hathaway Decl. ¶¶13, 23; Gause Decl. ¶11.

Expert researchers also predict the reductions will inevitably lead to institutionalization. Wallace Decl. ¶20 (UCLA); 2nd LaPlante Decl. ¶21 (UCSF); *see also* Schnelle Decl. (Dkt. 82) ¶5 (lack of affordable home care services is "a primary factor driving the need for nursing home placement"). County officials, social workers, and agency directors all cite specific examples of individuals on their caseload who are not eligible for Care Supplements but will require out-of-home placement as a result of the hours cut. D'Antonio Decl. ¶15; 3rd Collins Decl. ¶32 (76-year-old stroke victim needs reminders to eat, bathe, change clothes, and take medication; county will recommend that he move to board & care facility); 3rd Kaljian Decl. ¶17-18; Elliott Decl. ¶¶20-23; 3rd Guerra Decl. ¶¶11-12 (75-year-old woman with neurological disability will miss evening meals and other care and face serious risk of injury, hospitalization, and nursing home entry); 2nd Baran Decl. ¶15 (recipient with need for help with medical compliance, meals, and transportation to

appointments and recovery groups at risk). Indeed, some IHSS recipients' health deteriorated so severely with just the 3.6% cut that they had to be institutionalized. 2nd Hoffacker Decl. ¶7.

For example, Named Plaintiff Helen Polly Stern will likely enter a nursing home as a result of the hours reductions. The 86-year-old's owns her home and enjoys visits from her sister. Her needs are intensive, as she cannot get in and out of bed or prepare any food without assistance and needs help with dressing and pull-ups. Stern Decl. ¶¶1, 8, 10, 13, 23. Her provider comes twice each day to assist her, but this will not be possible given the hours reduction and her provider's need to earn additional income by taking on another client. *Id.* ¶18. Helen cannot survive without assistance twice a day, and will be forced into a nursing home, to her "despair." *Id.* ¶¶2, 24; *see also id.* ¶22 (reduced skin care likely to cause lesions and infection, leading to hospitalization).

Insufficient access to nutritious food will lead to deteriorating health and placement in a nursing home or board and care facility. 2nd Hoffacker Decl. ¶6; Benjamin Decl. (Dkt. 133) ¶30 ("Weight loss in elders is often the reason that they end up being placed in nursing homes"); *see also supra* 16-17 & n.32. Similarly, recipients who attempt unsafe activities in the absence of their provider—such as getting out of bed or showering unassisted, or attempting to clean house—may fall, break a bone, and be hospitalized. Kaljian Decl. ¶6; *see supra* 17 & nn.34-37. Hospitalization often leads to admission to a nursing home admission or other assisted living facility. Kaljian Decl. ¶6; 2nd Vescovo Decl. ¶18. Some recipients will be unable to find providers to work the reduced hourly schedule, leading to institutionalization. Smith Decl. ¶ 11; Lopez Decl. ¶10, 13. Recipients who are evicted because they cannot maintain a sanitary environment are at risk for homelessness and eventual institutionalization, including involuntary commitment. Elliott Decl. ¶24; *see also supra* 17-18 & n.38. Relative providers may institutionalize loved ones whom they can no longer afford to care for at home. G. Thompson Decl. ¶7.

For example, Named Plaintiff Andrea Hylton was formerly homeless. Hylton Decl. ¶10. She uses a walker or wheelchair for mobility because she is unsteady due to nerve problems and arthritis, and tires easily due to emphysema. *Id.* ¶¶3-5. Andrea also has bipolar disorder and panic attacks. *Id.* She currently lives in Section 8 housing, and will be evicted if she fails two inspections. *Id.* Because she has so few authorized hours to begin with, and already cut back

hours for meal preparation as a result of the 3.6% cut, she will have no choice but to reduce hours allocated to housekeeping. But she cannot clean house while using her walker or wheelchair; if she attempts to do so she is likely to fall and break a bone, due to her osteoporosis. *Id.* ¶¶6, 10. The alternative is to fail her inspections, be evicted, and be forced into a facility. *Id.* ¶10.

Institutionalization has devastating effects. Many IHSS recipients "have fought so hard to get out institutions. An attack on their IHSS services is a direct attack on their freedom and independence." 2nd Vescovo Decl. ¶31. For example, because Named Plaintiff Charles Thurman is a veteran and eligible for a VA facility, and his wife of 36 years is not, they may be separated if they are forced into nursing homes, as appears likely. Thurman Decl. ¶¶5, 24, 28. In some counties, insufficient nursing home space will force recipients to move completely away from their communities. 3rd Collins Decl. ¶8. Placement in an institution can destabilize already compromised mental or physical functioning, and it is extremely difficult for individuals to move back into the community. Gardner Decl. (Dkt. 70) ¶¶ 39, 45; 2nd Vescovo Decl. ¶18. Institutionalized individuals may receive inadequate care due to chronic understaffing. Schnelle Decl. (Dkt. 82) ¶6; Altman Decl. (Dkt. 62) ¶4. "Patients able to receive adequate care at home are better off in terms of nutrition, avoidance of potentially lethal infections, and mental health," and even the act of moving from home to a facility can itself cause deteriorating health. Altman Decl. (Dkt. 62) ¶4. Nursing homes generally have regimented and inflexible schedules. Schnell Decl. (Dkt. 82) ¶6. IHSS recipients fear institutionalization because they value the independence of community living and are aware that care in institutions is sometimes inadequate.[55]

[55] 3rd Jones Decl. ¶19 (hospitalization was worst experience of her life; felt was just a "body in a bed"); 2nd Hylton Decl. ¶8 (lack of privacy in nursing home would cause panic attacks; convalescent home where she worked did not timely change diapers or turn patients to prevent bedsores); Carpenter Decl. ¶21 (experienced abuse, stigma, and neglect in group home); Phillips Decl. ¶20 (abuse by other patients, over-medication, and disease in psychiatric institution); 2nd McHenry Decl. ¶17 (hospitalization for suicidal thoughts was "horrible"; Hayes Decl. ¶12 (loss of independence would be devastating); Baker Decl. ¶¶17, 34 (would rather die than go into home); Salazar Decl. ¶17 (would be depressed in nursing home); White Decl. ¶16; Stern Decl. ¶¶21, 23-24 (would lose touch with sister and friends; in convalescent home had no privacy, and "could not bear that on a permanent basis"); 2nd Hylton Decl. ¶20 (would lose pet companionship that helps prevent panic attacks); Swann ¶10 (felt "stuck and sad" when hospitalized); Salazar Decl. ¶17 (loss of independence); Baker Decl. ¶34 (similar); Hayes Decl. ¶12 (similar); Lott Decl. ¶23 (dignity and privacy; "couldn't understand or believe" treatment of friends in convalescent home); Cooper Decl. ¶16 (loss of autonomy); Uriarte Decl. ¶13 (loss of contact with sister and activities with other seniors); Mills Decl. ¶4 (psoriasis needs not accommodated in institution).

3. Plaintiffs Will Suffer Irreparable Injury.

This Court has previously determined that the loss of IHSS services constitutes irreparable injury. PI Order (Dkt. 198) 26:2-14 (citing *Beltran v. Meyers*, 677 F.2d 1317, 1322 (9th Cir. 1982) (potential denial of Medicaid benefits is irreparable injury); *Newton-Nations v. Rogers*, 316 F.Supp.2d 883, 888 (D. Ariz. 1994); *Edmonds v. Levine*, 417 F.Supp.2d 1323, 1342 (S.D. Fla. 2006)). In *Martinez v. Schwarzenegger*, 2009 WL 1844989, at *5 (N.D. Cal. June 26, 2009), this Court further elaborated on the irreparable harm likely to flow from the loss of IHSS assistance:

> The consumers' quality of life and health-care will be greatly diminished, which will likely cause great harm to disabled individuals. For instance, the declarations submitted by Plaintiffs describe harms ranging from going hungry and dehydration, to falls and burns, to an inability ever to leave the home. Institutionalizing individuals that can comfortably survive in their home with the help of IHSS providers will "cause Plaintiffs to suffer injury to their mental and physical health, including a shortened life, and even death for some Plaintiffs." *Crabtree v. Goetz*, 2008 WL 5330506, at *30 (M.D. Tenn.).

See also Independent Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly, 572 F.3d 644, 658 (9th Cir. 2009), *cert. granted on other issue*, 131 S.Ct. 992 (2011) (denial of needed medical care irreparable injury); *LaForest v. Former Clean Air Holding Co.*, 376 F.3d 48, 55-56 (2nd Cir. 2004) (reduction of retiree health benefits including increased cost of prescription medications); *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983) (deprivation of social security benefits); *Mayer v. Wing*, 922 F.Supp. 902, 905, 909 (S.D.N.Y. 1996) (reduction of personal home care services); *Crabtree*, 2008 WL 5330506, at *30 (same); *Long v. Benson*, 2008 WL 4571903, at *2 (N.D. Fla. Oct. 14, 2008) (similar). Plaintiffs' showing of harm here readily meets this standard.[56]

B. The Balance of Equities and Public Interest Favor Plaintiffs.

The Ninth Circuit has held that injuries from the loss of home care services outweigh the injury to the state fisc that may result from enjoining a budget reduction, because "individuals' interests in sufficient access to health care trump the State's interest in balancing its budget." *Dominguez v. Schwarzenegger*, 596 F.3d 1087, 1098 (9th Cir. 2010); *see also Independent Living*

[56] The Ninth Circuit has also held that injury to providers in the form of lost wages constitutes irreparable injury. *Dominguez*, 596 F.3d at 1097-98, *cert. granted on other issue*, 131 S.Ct. 992 (2011). Here, moreover, Plaintiffs have shown that many providers will themselves lose eligibility for health insurance. 2nd Jiminez Decl. ¶ 9; Adams Decl. ¶ 6.

Ctr., 572 F.3d at 659 ("A budget crisis does not excuse ongoing violations of federal law, particularly when there are no adequate remedies available other than an injunction."); *California Pharm. Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 853 (9th Cir. 2009); *Martinez*, 2009 WL 1844989, at *6; *Lopez*, 713 F.2d at 1437; *Daniels v. Wadley,* 926 F. Supp. 1305, 1313 (M.D. Tenn. 1996); *Kansas Hosp. Ass'n v. Whiteman*, 835 F. Supp. 1548, 1552-53 (D. Kan. 1993). This Court has reached the same conclusion. PI Order (Dkt. 198) 28:5-23 (budget crisis does not excuse legal violations and is outweighed by recipient hardship; in-home care cuts may increase institutional care costs, and state could save funds through individualized measures).

An injunction is also in the public interest. *See Lopez,* 713 F.2d at 1437 (deprivation of essential benefits harms public interest even if benefits are costly to government); *Martinez*, 2009 WL 1844989 at *6. "State budgetary considerations do not …, in social welfare cases, constitute a critical public interest that would be injured by the grant of preliminary relief. In contrast, there is a robust public interest in safeguarding access to health care for those eligible for Medicaid, whom Congress has recognized as the neediest in the country." *ILC*, 572 F.3d at 659. The public interest weighs in favor of enjoining unlawful reductions to IHSS. PI Order (Dkt. 198) 28:24-29:1.[57] An injunction will also preserve the status quo *pendente lite*, which is one of the purposes of a preliminary injunction under Rule 65. *See Chalk v. U.S. Dist. Court Cent. Dist. Cal.*, 840 F.2d 701, 704 (9th Cir. 1988).

II. Plaintiffs Are Likely to Succeed on the Merits of their Due Process, Medicaid, and Americans with Disabilities Act Claims.

A. The Reduction Notices Violate Due Process.

1. The Notices and Care Supplement Application Are Not Reasonably Calculated to Inform Aged and Disabled IHSS Recipients of Their Due Process Rights.

In 2009, this Court outlined the applicable due process principles governing notices:

> IHSS recipients must receive "timely and adequate notice detailing the reasons for termination and an effective opportunity to defend" themselves. *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970). To comport with due process, notice must be "tailored

[57] Moreover, the likely increased demand upon public services and threat of institutional placement means that the IHSS reductions may not save the state money. Cottrell Decl. ¶13; 2nd Jimenez Decl. ¶¶3, 7; LaPlante Decl. (Dkt. 85) ¶8.

> to the capacities and circumstances" of the recipients who must decide whether to request a hearing. [Citation omitted.] "The government must consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case." *Jones v. Flowers,* 547 U.S. 220, 221 (2006).

PI Order (Dkt. 198) 24:1-11. Applying these principles, this Court held that the 2009 notices likely violated due process: "Many class members, because of their disabilities or inability to read English or both, will be unable to understand and act upon the notice within ten days of receipt so that they can request a fair hearing and continue to receive IHSS services." *Id.* at 24:13-17.

IHSS recipients will be equally unable to understand the proposed notices regarding the 20 percent cut and county denial of the Care Supplement. Many of the notice problems mirror those presented in 2009: poor readability and technically complex language, a format that is inaccessible to recipients with vision disabilities, a short time frame that will impair recipients' ability to obtain assistance in asserting their rights, and failure to provide adequate translation. Other problems are new, such as the absence of information regarding the effective date of the reduction, whether recipients can appeal the reduction and on what basis, and the eligibility criteria for the Care Supplement.

"[W]hen notice is the person's due . . . [t]he means employed must be such as one desirous of actually informing the [recipient] might reasonably adopt to accomplish it." *Jones v. Flowers*, 547 U.S. 220, 221 (2006) (citation omitted); *accord Covey v. Town of Somers*, 351 U.S 141, 146-47 (1956). Here, Defendants are on notice that all IHSS recipients are elderly and/or disabled, and that many recipients have mental illnesses, cognitive impairments or dementia. 2nd Williams Decl. ¶12; Thomson Decl. (Dkt. 154) ¶12; 2nd Good Decl. ¶¶9-11; Ackel Decl. (Dkt. 131) ¶¶5(a)-(b), 7; *see also* Kline Decl. (Dkt. 31-3), Ex. B2 at 26, 28 (over 60 percent of recipients are elderly and nearly 14 percent have mental disorders according to CDSS data). Yet Defendants have ignored accepted guidance issued by state and federal agencies (including DHCS itself) that mandates a reading level of no more than 5th or 6th grade for effective communication with Medi-Cal recipients. Huntley-Fenner Decl. ¶12 (communications expert); 2nd Ackel Decl. ¶16.[58] The

[58] *See also*, *e.g.*, M.G. Decl. ¶¶3, 18 (farmworker parents with little education); Hayes Decl. ¶15 (unable to read or write); Baker Decl. ¶¶4, 18 (same re: Hayes).

planned notices have a 12th grade reading level, and are also formatted in such a way as to make them even more difficult to understand. *Id.* ¶¶14-17.

The content of the notices is also confusing. Recipients will receive a flyer describing the cuts, which states that "requests for a state hearing only to dispute the new state law requiring the 20-percent reduction in authorized service hours will be dismissed." 3rd RJN, Ex. 6 (Att. A). The mailing will also include a notice of action listing hours before and after the cuts on the front, while the reverse side describes state appeal rights without any explanation of how this relates to the hours reduction. *Id.* Ex. 6 (Att. A & B). The third document in the mailing will be an application for the new Care Supplement, which invites recipients to describe in five lines why they believe they are at risk of out-of-home placement but without explanation of the meaning of this term or what information they must submit to qualify. *Id.* Ex. 6 (Att. F); *accord* 2nd Williams Decl. ¶ 14 (no explanation of terms); 2nd Ackel Decl. ¶ 15 (same).

Taken as a whole, the mailing fails to explain why a new application is required when the recipient already receives IHSS, or whether recipients may both appeal and apply for Care Supplements, even though confusion over these subjects could result in untimely applications and/or dismissal of an appeal. 3rd Rivera Decl., ¶ 12 (recipient cannot tell "if I can appeal or not"); Preis Decl., ¶ 11(confusion over appeal vs. application); G. Thompson Decl. ¶13 (new application will confuse people); 2nd Ackel Decl. ¶¶15-17 (procedure to apply for supplement rather than appeal is so unusual that state "needs to be even more careful" about explaining it in the notice); 2nd Williams Decl. ¶17 (unusual procedure of applying for aid paid pending from county rather than the state will confuse recipients).

Because of the reading level and complexity of the notices and the unanswered questions they raise, most IHSS recipients will require the assistance of a county or agency social worker before they can properly respond. Defendants implicitly acknowledge this need, as notices encourage recipients to "contact your county IHSS office." 3rd RJN, Ex. 6 (Att. A). However, Defendants have chosen to send the notice during the holiday period, when many county offices will be closed and short-staffed. 2nd Keeslar Decl. ¶¶6-12. In addition, the number of affected recipients is likely to swamp the ability of county IHSS offices to respond within a short time frame to requests for assistance regarding these cuts. Elliott Decl. ¶26; 3rd Kaljian Decl. ¶13;

Cottrell Decl. ¶15; 3rd Collins Decl. ¶19; G. Thompson Decl. ¶16. In addition, delivery of the notices will likely be slowed down by the holiday period, with heavy mail volume and two days when post offices are closed. G. Thompson Decl. ¶18.

Defendants have no plans to provide notice in a format that is accessible to recipients who are blind or have impaired vision. Defendants are aware of this problem from the argument and evidence presented in 2009,[59] but still fail to offer notices in alternative formats (i.e. large print, Braille, tape) that will provide recipients with vision impairments with the information they need to assert their rights. 2nd Good Decl. ¶¶10-11; 3rd Kaljian Decl. ¶11; Smith Decl. ¶16; G. Thompson Decl. ¶14.[60] This violates due process.[61]

Defendants do not plan to send notices in languages other than English, Spanish, Armenian and Chinese. 3rd RJN, Ex. 6 (Att. C-E). However, there are other large populations of non-English speaking IHSS recipients who will receive no translations of the reduction notices. 3rd Collins Decl., Ex. A at 5-6; Elliott Decl. ¶28; Smith Decl. ¶15. CDSS's own data confirms that over 34,000 recipients will be unable to comprehend the notice because they speak only Vietnamese or Russian. Rich Decl. (Dkt. 148-1) Att. A. Defendants have made no provisions for these recipients, who will not receive adequate notice and will also be affected by the inability to contact their county workers and to obtain needed translation services over the winter holidays. PI Order (Dkt. 198) 24:12-25:4 (lack of translation raises due process issues); Keeslar 2nd Decl. ¶¶6-12 (county office closures and short staffing); Nguyen Decl. ¶¶5-6 (Vietnamese speaker cannot read English and no regular translator; may take provider longer than 15 days to find someone).

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[59] Pl. Br. (Dkt. 16) 23 n.20; Reply Br. (Dkt. 158) 7-9; Thomson Decl. (Dkt. 154) ¶12; Ackel Decl. (Dkt. 131) ¶¶5(a)-(b), 7; Williams Decl. (Dkt. 155) ¶¶11-12; Hoffacker Decl. (Dkt. 76) ¶8.

[60] *See also* Thurman Decl. ¶33 (blind recipient whose wife has dyslexia needs notices in very large print or on tape); Gunn-Cushman Decl. ¶2 (blind recipient must rely on IHSS provider who is not fluent in English to read notice; requests for alternative formats ignored); Hammers Decl. ¶17 (recipients will be unable to read notice due to blindness); Gonzalez Decl. ¶21 (similar).

[61] The denial of notice in alternate formats for recipients with visual impairments and blindness also violates the ADA. Title II prohibits discrimination and the exclusion of individuals from program services, benefits and activities on the basis of disability, and implementing regulations require Defendants to take appropriate steps to ensure communications with recipients who are blind or have vision impairments that are as effective as communications with others, including furnishing appropriate auxiliary aids and services where necessary. 28 C.F.R. §§ 35.160(a)-(b), 35.164. Here, IHSS recipients with vision impairments and blindness are excluded from participation in the appeal, fair hearing and new application process by Defendants' failure to accommodate them with notices in accessible formats.

Because notices with complex language, confusing instructions, and an inaccessible format and language are not reasonably calculated to inform recipients of their rights, Defendants will violate due process on this ground alone.

2. The Notices Omit Important Information Without Which Recipients Cannot Exercise Their Due Process Rights.

Defendants' notices also omit important information recipients need in order to exercise their hearing rights and ensure eligibility for aid paid pending. First, the planned notices fail to explain the use of functional ranks to determine eligibility for the Care Supplement, or to provide recipients with data on their own ranks. IHSS recipients have never been previously informed of their functional ranks and have had no opportunity to discuss these with their workers, much less to contest their rankings. PI Order (Dkt. 198) 25:14-19; Elliott Decl. ¶30; 3rd Guerra Decl. ¶10; Smith Decl. ¶13.[62] The notice that recipients have been denied the Care Supplement simply states, misleadingly, that "the proposed reduction in your authorized monthly hours does not put you at serious risk of out-of-home placement." 3rd RJN Ex. 6 at 11.[63]

"Due process requires notice that gives an agency's reason for its action in sufficient detail that the affected party can prepare a responsive defense." *Barnes v. Healy*, 980 F.2d 572, 579 (9th Cir. 1992). Thus, the Ninth Circuit held that notices telling welfare recipients who were custodial parents that the state would not "pass-through" collected child support payments because they were not "current support," with no further explanation, offered "no way of determining from the face of that notice why collected payments were not deemed current support and what information [the recipient] needs to challenge the agency's determination." *Id.* With such a notice the recipient "'is reduced to guessing what evidence can or should be submitted in response and driven to responding to every possible argument against denial at the risk of missing the critical one altogether,'" in violation of due process. *Id*. (citation omitted).[64] And on facts strikingly similar to

[62] *See*, *e.g.*, Thurman Decl. ¶32; Stern Decl. ¶26; M.G. Decl. ¶17; 2nd Hylton Decl. ¶21.

[63] Even where eligibility or full hours restoration is denied on grounds other than functional ranks (for example, availability of alternative resources), the notice does not explain this, so an IHSS recipient will have no idea what information he needs to challenge the denial.

[64] *Accord Kapps v. Wing*, 404 F.3d 105, 123-26 (2d Cir. 2005) (notices re: home energy assistance program did not include individualized budgetary information supporting state's decision to deny or reduce benefit); *Ortiz v. Eichler*, 794 F.2d 889, 892-94 (3d Cir.1986) (notices did not include calculations justifying denial of or reduction in welfare benefits); *Dilda v. Quern*, 612 F.2d 1055, 1057 (7th Cir. 1980) (notices stated "ultimate reason" for the reduction or

those here, the Supreme Court of Alaska held that notices reducing hours of in-home care services, which mentioned a new assessment tool but did not provide the numerical code that tool assigned, violated federal due process because they failed to offer "a meaningful opportunity to understand, review, and, where appropriate, challenge the department's action." *Baker v. State Dep't of Health & Soc. Serv.*, 191 P.3d 1005, 1008, 1011 (Ak. 2008).

Defendants' planned notices are even more deficient than those in *Barnes* and *Baker*. The notices fail not only to set forth recipients' individual functional ranks, but even to explain that functional ranks will be used at all to determine Care Supplement eligibility. Without a basic understanding of the eligibility system, a recipient cannot decide whether Defendants made a mistake that warrants appeal or properly contest Defendants' determination in a state hearing by challenging the accuracy of their functional ranks. Those functional ranks may well be inaccurate in many cases, and recipients have never previously had the opportunity to contest them.[65]

Second, while Defendants acknowledge that recipients may appeal the county's denial of a Care Supplement application, the notice of action informing recipients of this denial fails to specify the effective date of the resultant reduction. 3rd RJN, Ex. 6 at 10-11; *see also* 3rd Collins Decl., Ex. A at 7. Because recipients must file an appeal before the effective date of the reduction in order to receive aid paid pending, 3rd RJN (Att. B), failing to inform them of the effective date will deprive them of the crucial information they need in order to file a timely appeal.[66] This omission violates

termination of welfare benefits but not breakdown of income and allowable deductions); *Gray Panthers v. Schweiker*, 652 F.2d 146, 168-69 (D.C. Cir. 1980) (same); *Vargas v. Trainor*, 508 F.2d 485, 490 (7th Cir. 1974) (notice that required elderly and disabled individuals to meet with case managers or appeal without knowing basis of termination); *Vorster v. Bowen*, 709 F. Supp. 934, 944-47 (C.D. Cal. 1989) (Medicare recipients whose claims were denied were not provided with written notice of methodology carriers used to assess claims).

[65] *See* Stern Decl. ¶¶26-27 (named plaintiff should have ranks of 4 instead of 3 in bathing and dressing; might then qualify for Care Supplement); Thurman Decl. ¶¶12, 15, 31-32 (recipient should have ranks of 4 instead of 3 in bathing and dressing; might qualify for Care Supplement); 3rd Jones Decl. ¶¶21-23 (ranks of 1 that should be 3's in mobility and bladder care, and 1 in memory that should be 2); Maher Decl. ¶14 (rank of 1 for respiration should be 5, would then be eligible for supplement); Mills Decl. ¶ 5 (bipolar recipient with history of lapses in judgment and memory surprised about mental functional ranks of 1); Phillips Decl. ¶¶ 23-24 (paranoid-schizophrenic recipient has ranks of 2 for all mental functional ranks, provider unaware and unable to challenge them) Cooper Decl.¶¶10-11, 14, 19 (compromised judgment but mental functioning ranks of 1).

[66] The absence of an effective date also violates the federal Medicaid notice requirements. *See* 42 C.F.R. §431.210(e) ("Content of notice" must include "[a]n explanation of the circumstances under which Medicaid is continued if a hearing is requested") and 42 C.F.R.§

due process, since aid paid pending is part of the constitutional guarantee of a pre-termination hearing. *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970).[67]

3. Defendants Violate Due Process by Failing to Provide an Adequate Opportunity for a Pre-Termination Hearing When the Reduction Is Applied to a Recipient By Mistake.

The mandates of adequate notice, aid paid pending, and an impartial hearing protect against agency action "resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases." *Goldberg*, 397 U.S. at 267-68. Accordingly, due process requires that Defendants provide recipients with enough information to determine whether their services are being reduced in error and, if so, how to appeal that erroneous reduction. *See Barnes*, 980 F.2d at 579. While recipients do not have the right to challenge an across-the-board reduction in benefits, they *do* have a due process right to raise individual factual disputes about whether they are subject to the reduction at all.[68]

Here, the principal factual dispute will be whether a recipient is statutorily exempt from the reduction, and has received a reduction notice in error. Already, IHSS recipients frequently receive erroneous notices, including incorrect calculations of their share of cost or of the recent 3.6 percent reduction. 2nd Ackel Decl. ¶¶7, 8. Under SB 73, tens of thousands of IHSS recipients are statutorily exempt from the cuts because they are covered by one of California's seven Home and Community Based Services ("HCBS") Medicaid Waivers. Cal. Welf. & Inst. Code §12301.07(a)(5). According to knowledgeable officials, it is almost inevitable that some exempt waiver recipients will nonetheless receive reduction notices by mistake, given the large number of

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431.230 (a) (services must be maintained if "the recipient requests a hearing before the date of action").

[67] Defendants' notice also fails to explain that recipients have a right to a "home hearing," so that some may mistakenly believe they cannot challenge the loss of services because they cannot leave their homes due to their disabilities. This is an additional due process defect. PI Order (Dkt. 198) 25:10-13; *see also* Ackel Decl. (Dkt. 131) ¶5(c)).

[68] *See*, *e.g.*, *Budnicki v. Beal*, 450 F.Supp. 546, 553-54, 558 (E.D. Pa. 1978) (where state terminated optional Medicaid program, due process required "individual hearing ... so long as a program recipient might have individual questions to raise," such as possibility they are "entitled to the service under some other element" of Medicaid program); *Viverito v. Smith*, 421 F.Supp. 1305, 1309 (S.D.N.Y. 1976) (pre-reduction hearing required where recipients alleged that mass reduction in benefits pursuant to state law change created "'unforeseen emergency'" entitling them to continued aid for reasonable time); *Rosen v. Goetz*, 410 F.3d 919, 924, 929 (6th Cir. 2005) (due process satisfied because beneficiaries who presented "valid factual dispute" about eligibility for alternative Medicaid program in lieu of discontinued program were granted hearings).

recipients and the complexity of the data-matching between different agencies that will be required to identify them all.[69]

The automatic dismissal of an appeal based on mistaken application of the reduction would violate the clear mandate of *Goldberg v. Kelly*, 397 U.S. at 264. Consequently, Defendants must intend only that appeals raising a general challenge to the 20 percent reduction will be dismissed, and that appeals claiming mistakes will be considered, since they would surely concede that if an exempt recipient is issued a termination notice, she has a right to appeal this factual error. Unfortunately, Defendants' procedures are fatally flawed because they fail to explain this distinction to recipients, so that they will not know if they have received a notice in error and, if they have, what to do. Danneker Decl. ¶8; 2nd Rivera Decl., ¶ 11-12; 3rd Oster Decl. ¶ 7-8. Consequently, Defendants violate due process, since any recipient who relies on the information and instructions provided will lose her right to appeal and obtain aid paid pending.[70]

B. Defendants' Implementation of SB 73 Violates the Medicaid Act's Sufficiency, Reasonable Standards, Comparability, and EPSDT Requirements.

Congress established Medicaid in 1965 to enable states to provide medical services to individuals with limited ability to pay for health care. 42 U.S.C. § 1396-1396v. Medicaid is a cooperative program that allows states to receive federal financial assistance for the provision of medical assistance to low-income individuals. 42 U.S.C. § 1396. Participation is voluntary, but states that choose to participate must comply with the Medicaid Act and its implementing regulations. 42 U.S.C. § 1396; *Alexander v. Choate,* 469 U.S. 287, 289 n.1 (1985).[71]

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[69] Danneker Decl. ¶¶4-7 (regional center official describes risk of error in attempting to match data between different state agencies); 2nd Rosene Decl. ¶¶7-9 (same). Defendants' problem with data-matching between state agencies is not limited to the DD waiver, as two additional HCBS waivers are operated by state agencies other than Defendants DHCS and CDSS, which maintain their own data systems. 3rd RJN, Ex. 10 ¶2 (DHCS operates only four of the seven HCBS waivers). The timing of the inter-agency data match will create an additional source of error, as the data matches will need to be run on a regular basis to identify newly approved waiver recipients. Danneker Decl. ¶7.

[70] For similar reasons, the notice's failure to explain which recipients should be automatically preapproved for Care Supplements and so should not receive notices of reduction (for example, recipients who receive protective supervision services) also violates due process.

[71] As set forth in the Complaint, many of plaintiffs' Medicaid claims are brought pursuant to 42 U.S.C. § 1983. The Medicaid provisions at issue are also enforceable directly under the Supremacy Clause. *Independent Living Center of Southern California, Inc. v. Shewry*, 543 F.3d 1050, 1058-59 (9th Cir. 2008), *cert. denied*, 129 S.Ct. 2828 (2009). While the Supremacy Clause issue is under review by the United States Supreme Court, unless and until Ninth Circuit precedent

1. By Failing to Provide Adequate In-Home Services, Defendants Violate the Sufficiency Requirement.

Medicaid's "sufficiency" requirement mandates that "[e]ach service … be sufficient in amount, duration, and scope to reasonably achieve its purpose." 42 C.F.R. §440.230(b). Thus, when a state has committed to provide a Medicaid service, it must adequately fulfill that obligation. PI Order (Dkt. 198) 19:22-27. To determine whether a service is sufficient, a court considers whether the level of service achieves the specific program's purposes. *See Curtis v. Taylor*, 625 F.2d 645, 651 (5th Cir. 1980).

For example, a state's limitation of preventative dental checkups to every three years (instead of annually) and elimination of certain dental services violate the sufficiency mandate when the resulting program failed to achieve its preventative, maintenance and restorative purposes. *Mitchell v. Johnston*, 701 F.2d 337, 347-51 (5th Cir. 1983); *see also Lankford v. Sherman*, 451 F.3d 496, 511-13 (8th Cir. 2006) (providing oxygen and limited respiratory equipment, but not other necessary breathing assistance equipment, violates sufficiency requirement); *Weaver v. Reagen*, 886 F.2d 194, 197-200 (8th Cir. 1989) (program's failure to cover prescriptions for certain individuals violates sufficiency requirement); *Charpentier v. Belshe*, 1994 WL 792591, *5 (E.D. Cal. Dec. 21, 1994) (reimbursement limits that result in denial of supplies and equipment violate sufficiency requirement).

This Court previously held that elimination of certain services authorized under IHSS would likely violate the sufficiency mandate:

> The services currently provided through IHSS have already been determined by social workers to be "necessary" to permit elderly and disabled individuals to remain safely in their homes. MPP §30-761.1. *Thus, the elimination of these services will likely leave affected individuals without a level of service sufficient to achieve the purpose of the program.* Accordingly, the Court concludes that Plaintiffs are likely to succeed on their sufficiency claim.

PI Order (Dkt. 198) 20:16-23 (emphasis added). This Court's reasoning is equally applicable to the 20 percent cut at issue here, which will leave some recipients with even fewer hours than the

on the issue is reversed, it remains binding. *See United States v. Gamma Tech Indus., Inc.*, 265 F.3d 917, 930 n.12 (9th Cir. 2001).

2009 cuts.[72] Plaintiffs' evidence demonstrates that the reduction will leave the remaining hours insufficient for numerous IHSS recipients. *See supra* at 14-21. Thus, SB 73's reduction of IHSS services is preempted by Medicaid's sufficiency mandate.

Defendants may argue that the IHSS Care Supplement process ensures that service levels will remain sufficient to accomplish the program's objectives, but that argument lacks merit for a number of reasons. First, a Care Supplement may be granted only based on serious risk of *out-of-home placement*. Cal. Welf. & Inst. Code §12301.07(f). Recipients who will remain in their homes but suffer injuries and/or deterioration of health are statutorily ineligible. But the purpose of the IHSS program is not just to avoid institutionalization; rather, it is to provide services that enable recipients to remain "*safely* … in their homes." Cal. Welf. & Inst. Code §12300(a) (emphasis added); *see also* MPP 30-761.1. A process for hours restoration that considers only risk of institutionalization, and not risk of harm to health or safety, does not adequately ensure that IHSS service levels continue to accomplish the program's purpose.

Second, SB 73 places the burden on elderly or disabled recipients to take the initiative to apply for IHSS Care Supplements rather than providing for county or state identification of recipients who need to maintain current service levels in advance of the reduction. Moreover, Defendants have established strict deadlines by which recipients must apply in order to be eligible (March 1, 2012) and/or in order to maintain authorized services while their application is evaluated (January 3, 2012). *See supra* at 7-9. But as in *Vargas v. Trainor,* 508 F.2d 485, 489-90 (7th Cir. 1974), elderly or disabled individuals may "be unable or disinclined, because of physical handicaps and, in the case of the aged, mental handicaps as well, to take the necessary affirmative action" on

[72] Many recipients will lose more hours than they would have in 2009. For example, plaintiff Charles Thurman would have lost 3.25 monthly hours for shopping and errands under ABX4 4, but will lose 6.23 hours under SB 73. Thurman Decl. ¶¶2, 24, 30, Ex A; *see also id.* ¶¶3, 4, 30, Ex. A (wife would lose 3.25 hours under ABX4 4 versus 7.96 under SB 73); Cooper Decl. ¶¶2, 17, Ex. A (6.5 versus 10.09); D. Hammers Decl. ¶¶1, 14, Ex. A (3.25 versus 13.64); Hammers Decl. ¶¶1, 2, 14, Ex. A (3.25 versus 13.97 and 6.5 versus 15.35); Hicks Decl. ¶¶1, 20, Ex. A (6.5 versus 10.03); Salazar Decl. ¶¶2, 18, Ex. A (4.33 versus 11.84); Swann ¶13, Ex. A (6.5 versus 11.68). Other declarants would have lost more under ABX4 4. Jones Decl. ¶¶2, 20, Ex. A (19.49 versus 9.29); Cline ¶¶1, 16, Ex. A (15.16 versus 6.93); White Decl. ¶¶2, 19, Ex. A (25.98 versus 8.06). Moreover, for many recipients, the reduction will be the practical equivalent of the elimination of categories of domestic and related services, because they will be unable to reduce hours in other categories. *E.g.*, Milian Decl. ¶12; Hutchens Decl. ¶15.

the notice. Many eligible recipients simply will not apply, because they cannot open or read their mail without assistance. 3rd Kaljian Decl. ¶¶11-12; Calavan Decl. ¶9; 3rd Collins Decl. ¶¶17-20; 3rd Guerra Decl. ¶23; 2nd Marconi Decl. ¶13; Williams Decl. (Dkt. 155) ¶¶12-14; S. Good Decl (Dkt. 139) ¶9.[73] Others' mental health or cognitive issues will pose serious barriers to taking the initiative to apply.[74] Even individuals with ranks of 5 for memory, orientation, or judgment will have to meet the January 3 deadline if they do not receive protective supervision. 3rd Collins Decl. ¶20. Defendants themselves acknowledge that many eligible recipients will not submit applications for Care Supplements. 2nd Keeslar Decl. ¶17, Ex. A. Thus, a substantial percentage of IHSS recipients who are eligible for the Care Supplement will not receive it based on their failure to submit a timely application.

Third, Defendants' implementation of SB 73 excludes from eligibility for Care Supplements even individuals who can show risk of out-of-home placement, if their functional ranks fall below certain levels. *See supra* at 8-9. This Court has already determined that functional ranks are not reasonable measures of need; nor can they reasonably be used to assess risk of out-of-home placement. *See supra* at 10-13. Thus, the Care Supplement process will not ensure that such individuals maintain service levels sufficient to keep them safely at home.

2. Reduction of Hours for Purely Budgetary Reasons, and Using Functional Ranks to Determine Eligibility for Hours Restorations, Violates the Reasonable Standards Requirement.

[73] *See also* Thurman Decl ¶33 (recipients' blindness and dyslexia); M.G. Decl. ¶5 (staff at hospital helped her apply for IHSS 5 years ago, not sure she could apply for something new on her own); Guerin Decl. ¶¶17-24 (recipient functions at 9-year-old level, lacks judgment to appreciate importance of documents and frequently hides mail); Hayes Decl. ¶15 (unable to read or write); Baker Decl. ¶¶4, 18; Hammers Decl. ¶17 (recipients cannot read mail due to blindness, and may not even know notice has arrived); Mills Decl. ¶¶ 7-8 (often bed-bound, and misplaces important mail due to concentration and mobility impediments); Swann Decl. ¶¶14-15 (consumer with mental disabilities does not understand IHSS notices); Goff Decl. ¶21 (same); Mills Decl. ¶ 9 (consumer with bipolar disorder and visual dyslexia cannot fill out forms).

[74] Preis Decl. ¶11 (recipients with psychiatric disabilities afraid to open mail, lose track of mail); Crain Decl. ¶13; 3rd Jones Decl. ¶¶18, 19 (too frightened by possible cuts to even think about it, may not have concentration to follow-through correctly); 2nd Hylton Decl. ¶23 (stress, anxiety and depression will prevent timely response); 3rd Jones Decl. ¶24 (would be too confused and overwhelmed to correctly respond); Lott Decl. ¶28 (very confused and forgetful; depression could make unable to respond); Love Decl. ¶25 (schizophrenia prevents focusing on or understanding written notices, library may not be open around the holidays to help with comprehension of mail); Meireles Decl. ¶4 (mentally ill consumer will be paralyzed and overwhelmed); *see also* Ackel Decl. (Dkt. 131) ¶7; Williams Decl. (Dkt. 155) ¶18; S. Good Decl. (Dkt. 139) ¶6; Kaljian Supp. Decl. (Dkt. 141) ¶9.

The Medicaid Act further requires that all participating states employ "reasonable standards … for determining … the extent of medical assistance under the plan which … are consistent with the objectives of this subchapter." 42 U.S.C. § 1396a(a)(17); *see also Wisconsin Dep't of Health & Fam. Serv. v. Blumer*, 534 U.S. 473, 479 (2002); *Schweiker v. Gray Panthers*, 453 U.S. 34, 36-37 (1981). The primary objectives of the Medicaid program are to provide medical assistance to individuals whose income and resources are insufficient to meet the costs of necessary medical services and to furnish "rehabilitation and other services to help such … individuals attain and retain capability for independence or self care." 42 U.S.C. § 1396-1.

Courts invalidate state Medicaid rules that deny coverage of services on an arbitrary or irrational basis as contrary to, and so preempted by, the reasonable standards requirement. *See Lankford*, 451 F.3d at 511-13 (reasonable standards violation likely where state unreasonably restricted optional medical equipment benefit); *Hern v. Beye*, 57 F.3d 906, 910-11 (10th Cir. 1995) (state law restricting medically necessary treatment to those whose lives were at risk not reasonable standard); *Preterm, Inc., v. Dukakis*, 591 F.2d 121, 131 (1st Cir. 1979) (state could not restrict medically necessary services solely on basis of diagnosis); *White v. Beal,* 555 F.2d 1146, 1151 (3d Cir. 1977) (enjoining policy for glasses coverage because it discriminated "based upon etiology rather than need for the service"); *Allen v. Mansour*, 681 F.Supp. 1232, 1238 (E.D. Mich. 1986) (state medical necessity criteria arbitrary when unsupported by expert opinion or scientific data).

Defendants' reduction of IHSS services violates the reasonable standards mandate in a number of ways. Initially, there is no dispute that the 20 percent reduction figure was driven by budgetary needs, and not by any reasonable determination that recipients needed fewer hours. That reliance on budgetary objectives rather than reasonable or evidence-based needs assessment to determine service levels violates the reasonable standards mandate. *Cf. Cota v. Maxwell-Jolly*, 688 F.Supp.2d 980, 992 (N.D. Cal. 2010) (modification of adult day services eligibility requirements, without explanation of "how these changes are linked to the individual's circumstances, particular need for [adult day] services or their risk of institutionalization").

Moreover, this Court has already determined that the use of functional ranks to allocate medical assistance violates reasonable standards. PI Order (Dkt. 198) 18:13-21. Under that ruling,

restricting eligibility for Care Supplements based on functional ranks employs an unreasonable standard to determine the extent of medical assistance in violation of § 1396a(a)(17).[75]

3. By Providing Differing Levels of Medical Assistance to Individuals With Similar Needs, Defendants Violate the Comparability Requirement.

The "comparability" requirement of the Medicaid Act, 42 U.S.C. § 1396a(a)(10)(B), "mandates comparable services for individuals with comparable needs and is violated when some recipients are treated differently than others where each has the same level of need." PI Order (Dkt. 198) 12:7-10; *see also Jenkins v. Washington State Dep't Social & Health Servs.*, 157 P.3d 388, 392 (Wash. 2007); *Sobky v. Smoley*, 855 F. Supp. 1123, 1139 (E.D. Cal. 1994); *Hodgson v. Board. of County Com'rs, Hennepin County*, 614 F.2d 601, 608 (8th Cir. 1980); 42 C.F.R. §440.240. Courts have thus found that states violate the Medicaid Act when they fail to offer the same service to all with the same need. *See*, *e.g.*, *Parry v. Crawford*, 990 F.Supp. 1250, 1257 (D. Nev. 1998) (comparability violated where state provides certain services to those with mental retardation but not those with "related conditions"). Courts do not blindly accept states' recitations that they are making needs-based distinctions, but examine the evidence to determine whether it is actual need, or some other factor like diagnosis, that determines eligibility for services. *See Jenkins*, 157 P.3d at 299 (reduction of services to recipients who live with caregiver violates comparability because "it reduce[d] a recipient's benefits based on a consideration other than the recipient's *actual* need") (emphasis in original); *White*, 555 F.2d at 1150-51 & n.3 (provision of eyeglasses to recipients with eye diseases, but not refractive error, violated comparability).

Defendants' implementation of SB 73 violates the comparability mandate in three ways. First, the use of functional ranks to exclude recipients from eligibility for Care Supplements will result in individuals with comparable need receiving different levels of IHSS. This Court has already held that "[t]he use of numerical ranks … to determine eligibility for IHSS services likely

[75] Additionally, because the use of functional ranks has a disparate impact on recipients with mental, as opposed to physical, impairments, it is inconsistent with the related regulation that prohibits arbitrary limitations on required services "based solely on diagnosis, type of illness, or condition." 42 C.F.R. § 440.230(c); *see White*, 555 F.2d at 1152 (§440.230(c) violated by limiting provision of optional eyeglass benefit based on source of vision impairment); *Jeneski v. Myers*, 163 Cal.App.3d 18, 33 (Cal. Ct. App. 1984) (§440.230(c) violated by across-the-board denial of drug that would be merely palliative for some Medicaid recipients but medically necessary for others).

violates the comparability requirement" because ranks do not "reasonably measure[] the individual need of a disabled or elderly person for a particular service." PI Order (Dkt. 198) 12:24-27; *see also id.* at 12:28-13:20 ("particularly inaccurate measures of the needs of individuals with mental impairments"); *id.* at 13:21-14:5 (*any* rank of two or more demonstrates inability to remain safely at home without assistance); *id.* at 15:24-28 (particularly inaccurate measure of children's needs). "IHSS recipients have been assessed in an individualized process to determine the services they need to remain safely in their homes," and the "mechanical[] application" of functional ranks "to a use for which they were not designed" distinguishes among recipients based on a factor other than actual need. *Id.* at 17:11-21.

Second, the March 1, 2012 application deadline means that California will authorize different services for IHSS recipients based on the date of their application for a Care Supplement, rather than based on differences in actual need. Individuals who miss the deadline inadvertently, attempt to cope with the hours reduction and later discover they need their full hours authorization, deteriorate after March 1 in a way that heightens their risk of out-of-home placement, or have hours reduced through a post-March 1 reassessment such that they can no longer tolerate a 20 percent reduction, will be eligible for only 80 percent of the hours for which they would have been eligible had they applied prior to March 1. *See supra* at 9 (many recipients will miss deadlines); 2nd Marconi Decl. ¶13; 3rd Collins Decl. ¶21. That violates the comparability mandate.

Third, SB 73 exempts IHSS recipients who receive services under specified waiver programs, but not those who have identical need, including those who are on waiting lists for those waivers. *See supra* n.18. Those waiting lists are substantial. 3rd RJN, Ex. 11 ¶30, Ex. 12 (Ex. A).[76] Exempting one group from the reduction while imposing it on the other violates the comparability mandate.

4. Imposing a 20 Percent Reduction on Children and Youth Under Age 21 Violates the EPSDT Mandate in Federal Medicaid Law.

[76] While Medicaid waivers may waive the comparability requirement, any such waiver would be only with respect to services provided under those waivers, *not* with respect to IHSS services which are provided not under a waiver but under the California State Medicaid Plan. Carroll Decl. (Dkt. 113) ¶7.

States are required to provide "early and periodic screening, diagnostic, and treatment services," known as EPSDT, for all Medicaid-eligible children under age 21. 42 U.S.C. §1396d(a)(4)(B). EPSDT services include "[s]uch other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of this section to correct or ameliorate defects and physical and mental illnesses." 42 U.S.C. §1396d(r)(5). The Ninth Circuit has explained that "states must 'cover every type of health care or service necessary for EPSDT corrective or ameliorative purposes that is allowable under § 1396d(a).'" *Katie A. v. Los Angeles County*, 481 F.3d 1150, 1154 (9th Cir. 2007) (citations omitted). "The EPSDT obligation is thus extremely broad." *Id.* Personal care services such as IHSS are expressly subject to the EPSDT mandate. 62 Fed. Reg. 47896, 47898 (Sept. 11, 1997).

Under the EPSDT provisions in 42 U.S.C. § 1396a(a)(43)(C), states have an affirmative obligation to ensure that children actually receive all of the services identified as medically necessary during a screening or assessment. *Katie A.*, 481 F.3d at 1158. "States also must ensure that the EPSDT services provided are reasonably effective." *Id.* at 1159. They may limit required EPSDT services based only on medical necessity. *Id.*; *see also Moore ex rel. Moore v. Reese*, 637 F.3d 1220, 1255 (11th Cir. 2011) (state may not reduce children's medically necessary hours of private duty nursing); *SD ex rel. Dickson v. Hood*, 391 F. 3d 581, 593-94 (5th Cir. 2004) (incontinence supplies); *Collins v. Hamilton*, 349 F. 3d 371, 376 (7th Cir. 2003) (psychiatric residential treatment); *Pediatric Specialty Care, Inc. v. Arkansas Dept. of Human Services*, 293 F.3d 472, 480 (8th Cir. 2002) (early intervention day treatment).

Here, there can be no dispute that the 20 percent reduction is an across-the-board limitation that is not based on medical necessity, and thus violates the EPSDT mandate. Nor does the Care Supplement process legitimize the reduction, for several reasons. First, eligibility for the Care Supplement is not based on whether the services are medically necessary and will "ameliorate" the child's condition by ensuring his or her health and safety, as required by 42 U.S.C. §1396d (r)(5). Instead, eligibility is ostensibly based upon the risk that the child will end up in a different placement. This inquiry, while relevant to the ADA, does not correlate with medical necessity. In fact, named plaintiff L.C. does not qualify for the Care Supplement, although all the hours she currently receives are medically necessary to manage her rare metabolic disorder at home, which

requires complicated tube feedings and special care to prevent infection and illness and ensure her growth and development. M.G. Decl. ¶¶4-6, 14; *see also* J.O. Decl. ¶¶3, 5, 20.

Second, the procedure for obtaining the Care Supplement does not ensure that all eligible children will receive it. Under the EPSDT screening and treatment provisions of 42 U.S.C. §1396a(a)(43)(C), a child's receipt of medically necessary services cannot be left to chance, even the chance that his or her parents will not respond to a notice. The "[state's] obligations with respect to EPSDT services require more proactive steps, such as actual provision of services." *Katie A.,* 481 F.3d at 1158 (quoting *Clark v. Richman*, 339 F.Supp.2d 631, 646-47 (M.D.Pa. 2004); *accord Chisholm v. Hood*, 110 F.Supp.2d 499, 507 (E.D.La. 2000) ("states are further obligated to actively arrange for corrective treatment" under §1396a(a)(43)(C)); *Salazar v. Dist. of Columbia*, 954 F.Supp. 278, 330 (D.D.C. 1996) (failure to ensure children receive diagnosis and treatment for health problems detected during screening violated §1396a(a)(43)(C)); *John B. v. Menke*, 176 F.Supp.2d 786, 801 (M.D. Tenn.2001) (state cannot "disclaim responsibility for the ultimate provision of EPSDT-compliant services by a once-removed provider"). Once a county social worker has assessed a child and determined the IHSS hours that are necessary, Defendants cannot disclaim responsibility for whether a child's hours are actually restored via the Care Supplement, especially given the deadlines and complications inherent in that application process.

Finally, reliance on the Care Supplement to redeem cuts to children's IHSS hours cannot be reconciled with this Court's previous finding that the functional ranks themselves are weighted against children. PI Order (Dkt. 198) 15:24-28 (particularly inaccurate measure of children's needs). Because children's functional ranks are likely to be lower than those of adults, children are far less likely to qualify for the Care Supplement. *See supra* at 13 & n.27.

C. Defendants' Implementation of SB 73 Violates Title II of the ADA and Section 504 of The Rehabilitation Act.

1. Reduction of IHSS Hours Under SB 73 Violates the ADA's Integration Mandate by Placing People with Disabilities at Risk of Unnecessary Institutionalization.

The ADA and Section 504 (collectively "ADA") prohibit discrimination based on disability. 42 U.S.C. §12132; 29 U.S.C. §794(a). "Unnecessary isolation is a form of discrimination against people with disabilities" in that it perpetuates stereotypes and diminishes the

quality of life of people with disabilities. PI Order (Dkt. 198) 21:4-13 (citing *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597, 600-601 (1999)).

The ADA's integration mandate requires provision of services "in the most integrated setting appropriate to the needs of qualified persons with disabilities." 28 C.F.R. § 35.130(d). "'The 'most integrated setting' is defined as 'a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.'" PI Order (Dkt. 198) 21:25-22:2 (quoting *Brantley v. Maxwell-Jolly*, 656 F.Supp.2d 1161, 1170 (N.D. Cal. 2009)). This "integration mandate" "serves one of the principal purposes of Title II of the ADA: ending the isolation and segregation of disabled persons." *Arc of Washington State v. Braddock*, 427 F.3d 615, 618 (9th Cir. 2005).[77]

"[P]laintiffs who currently reside in community settings may assert ADA integration claims to challenge state actions that give rise to a risk of unnecessary institutionalization." PI Order (Dkt. 198) 22:9-12 (citing *Fisher v. Oklahoma Health Care Auth.,* 335 F.3d 1175, 1181-82 (10th Cir.2003)) (cap on prescription medications placed participants in community-based program at high risk for premature entry into nursing homes in violation of ADA); *Hunter v. Cook*, 2011 WL 4500009 at *5 (N.D. Ga. Sept. 27, 2011); *Ball v. Rodgers*, 2009 WL 1395423 at *5 (D. Ariz. Apr. 24, 2009); *Mental Disability Law Clinic v. Hogan*, 2008 WL 4104460 at * 15 (E.D.N.Y. Aug.28, 2008)); *see also Townsend v. Quasim*, 328 F.3d 511, 514-18 (9th Cir. 2003); 3rd RJN, Ex. 9 (Department of Justice Brief) at 14, 18-24 & n.5 (citing cases and statutory and regulatory language). As the United States Department of Justice has explained, that risk may result from deterioration over time and need not be imminent. 3rd RJN, Ex. 9 at 13-14, 24-26 & n.3; *see also Fisher*, 335 F.3d at 1184-85 (many plaintiffs would remain in homes "until their health ha[d] deteriorated" and would "eventually end up in a nursing home").[78]

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[77] To establish an *Olmstead* claim, a plaintiff must show (1) the state's treatment professionals have determined that community-based services are appropriate, (2) the disabled individual does not oppose such community-based treatment, and (3) the provision of community-based services can be reasonably accommodated, taking into account the resources available to the state and the needs of other individuals with disabilities. *Olmstead*, 527 U.S. at 587.

[78] The Department of Justice's interpretation of the integration regulation as violated by the risk of institutionalization, even when that risk is not imminent, is entitled to deference. *See Zurich American v. Whittier Properties*, 356 F.3d 1132, 1137 & n.27 (9th Cir. 2004); *Barden v. City of Sacramento*, 292 F.3d 1073, 1077 (9th Cir. 2002); *see also Olmstead*, 527 U.S. at 597-98; *Auer v.*

Here, the statutes and regulations that govern the IHSS program themselves establish that the reduction of IHSS services will place recipients at risk of unnecessary institutionalization, because only services that are necessary to permit individuals to remain safely at home may be authorized in the first place. *See supra* at 6. Also, the evidence submitted here demonstrates a dramatic risk of institutionalization for many class members. *See supra* at 23-26.[79]

Defendants may argue that the opportunity to apply for IHSS Care Supplements obviates the risk of institutionalization and so prevents an ADA violation. That is not the case. First, other than the small number of individuals who fall into categories that will be preapproved, Defendants place the obligation upon IHSS recipients to apply for Care Supplements. 3rd RJN , Ex. 6. For reasons discussed, including the effects of their disabilities, many recipients simply will not apply, or will not apply on time. *See supra* at 30-31, 37-38. Defendants acknowledge that many eligible recipients will not apply. 2nd Keeslar Decl. ¶17, Ex. A. "Defendants bear the ultimate responsibility for ensuring the State's compliance with federal disability law," PI Order (Dkt. 198) 23:13-14, and so cannot satisfy their ADA obligation by relying on recipients' ability to understand the notice and act quickly to protect their interests.

Second, Defendants have excluded from eligibility for Care Supplements hundreds of thousands of recipients who face serious risks of out-of-home placement. 2nd Keeslar Decl. ¶¶14-16 (state official says two-thirds of recipients won't be eligible). Counties, acting as agents of the State, have awarded hours to these recipients based on individualized determinations that they need these hours to remain safely at home. *See supra* at 6. That need does not depend on the recipient's

Robbins, 519 U.S. 452, 462 (1997); *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 397 (2008).

[79] Maintenance of current IHSS hourly authorizations would not require fundamental alteration of the program, since plaintiffs are "not demanding a separate service or one not already provided." *Fisher*, 335 F.3d at 1183. It is well-established that "budgetary constraints alone are insufficient to establish a fundamental alteration defense." *Pennsylvania Protection & Advocacy, Inc. v. Pennsylvania Dept. of Public Welfare*, 402 F.3d 374, 380 (3rd Cir. 2005); *see also Frederick L. v. Dept. of Public Welfare of Com. of Penn.*, 364 F.3d 487, 495-96 (3rd Cir. 2004); *Fisher*, 335 F.3d at 1182-83; *Townsend*, 328 F.3d at 520; *Haddad v. Arnold*, 784 F.Supp.2d 1284, 1305 (M.D. Fla. 2010); *Cota v. Maxwell-Jolly*, 688 F.Supp.2d 980, 995 (N.D. Cal. 2010) (appeal pending). Moreover, if even a small proportion of the 372,000 IHSS recipients at risk here end up in hospitals, emergency rooms or nursing homes, the cost may actually exceed the savings from the 20 percent reduction. *See supra* at 6-7 & n.15.

functional rank for specified personal care services or mental functioning. *See supra* at 10-13. This Court has already held that individuals with functional ranks of less than 4 for domestic and related services would likely face a risk of institutionalization if those domestic and related services were taken away. PI Order (Dkt. 198) 22:24-23:8. Here, 20 percent of all IHSS services are being eliminated, and high functional ranks for a limited number of functions are not a reasonable way to distinguish individuals who are at risk from those who are not.

2. Defendants' Implementation of SB 73 Discriminates Against People with Psychiatric and Cognitive Disabilities.

Defendants' use of functional ranks to exclude certain recipients from eligibility for IHSS Care Supplements also violates the ADA because it will have a uniquely detrimental effect upon people with psychiatric and cognitive disabilities, in violation of 28 C.F.R. §35.130(b)(8) (prohibiting "eligibility criteria that screens out or tends to screen out … *any class of individuals with disabilities* from fully and equally enjoying any service, program, or activity") (emphasis added); *see also* 45 C.F.R. §84.4(b)(4).[80]

As previously explained, the use of functional ranks as eligibility criteria will have a uniquely detrimental and disproportionate impact upon persons with cognitive and psychiatric disabilities. Such individuals are likely to have many functional ranks of 2, as the nature of their disability means that they need verbal encouragement or cueing, not necessarily physical assistance – even though their need for assistance is just as critical. *See supra* at 12-13. Defendants may respond that they are giving adequate consideration to cognitive disabilities by providing that a rank of 5 for any mental function will make a recipient potentially eligible for a Care Supplement.[81] However, because the standard for a functional rank of 5 is so high, and because the mental functioning ranks do not measure psychiatric illnesses such as depression, Defendants' standards will leave individuals with moderate cognitive disability and psychiatric disabilities ineligible. *See supra* at 10 n.21, 12-13.

[80] This discrimination if actionable even though its adverse impact is confined to individuals with mental disabilities, rather than *all* individuals with disabilities. *See Olmstead*, 527 U.S. at 598 & n.10.

[81] Because mental functioning is ranked only 1, 2, or 5, a recipient would have to have at least one functional rank of 5 in order to qualify for the Care Supplement. *See supra* at 9.

3. Defendants' Implementation of SB 73 Uses Methods of Administration that Discriminate Against People with Disabilities.

The ADA prohibits methods of administration that have a discriminatory effect on people with disabilities, including by "substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities." 28 C.F.R. §35.130(b)(3); *see Alexander*, 469 U.S. at 296-97; *Helen L. v. DiDario*, 46 F.3d 325, 335 (3rd Cir. 1995); *Crowder v. Kitigawa*, 81 F.3d 1480, 1484 (9th Cir. 1996). The purpose of the IHSS program is to permit recipients to remain safely at home. Cal. Welf. & Inst. Code § 12300(a); *see also Miller,* 148 Cal.App.3d at 867. Defendants' requirement that IHSS recipients apply for IHSS Care Supplements, deadlines for applying, and functional rank eligibility limitations will significantly impair this purpose of IHSS. *See Brantley*, 656 F.Supp.2d at 1175-76 (defendants' failure to provide sufficient notice and information regarding reduction in Medi-Cal services likely violated methods of administration regulation); *Kathleen S. v. Pennsylvania Dep't of Publ. Welfare*, 10 F.Supp.2d 460, 473 (E.D.Pa. 1998) (state's "failure to adequately plan for the community placements" constituted discriminatory methods of administration). Defendants' methods of administration will also subject individuals to disability discrimination by screening out many individuals with cognitive and psychiatric disabilities. *See supra* at 12-13.

CONCLUSION

For all the foregoing reasons, Plaintiffs request that this Court issue an immediate temporary restraining order.

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Respectfully Submitted,

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