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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

LILLIE BRANTLEY, by her guardian ad litem Chauncey McLorin; GILDA GARCIA; ALLIE JO WOODARD, by her guardian ad litem Linda Gaspard-Berry, individually and on behalf of all others similarly situated, Plaintiffs, vs. DAVID MAXWELL-JOLLY, Director of the Department of Health Care Services, State of California, DEPARTMENT OF HEALTH CARE SERVICES, Defendants.	**Case No.: C09-03798 SBA** **CLASS ACTION** **PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** **Date: September 9, 2009** **Time: 1:00 P.M.** **Place: Courtroom One, Fourth Floor**

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I. INTRODUCTION

In the absence of a Preliminary Injunction, over 8000 elderly, frail, and disabled Californians will lose the Medi-Cal services they need to remain at home. Defendants have already determined, following an extensive process of assessment and review, and as a matter of state law, that **each** of these individuals' conditions **require adult day health care services…on each day of attendance,** that are individualized and designed to maintain the ability of the participant to remain in the community and avoid emergency department visits, hospitalizations, or other institutionalization." Cal. Welf. & Inst. Code § 14526.1(d)(5). These admissions by Defendants establish Defendants' obligation under the Americans with Disabilities Act (ADA) and the Supreme Court's *Olmstead* decision, as well as irreparable harm. Defendants cannot now, after the fact, attempt to contradict their own multi-disciplinary team assessments and authorizations with blithe assertions that Plaintiffs' and class members' needs could easily be met in another fashion.

Defendants have also failed to provide timely or legally adequate notice of the pending cuts. To date, no participants have received individual notices with the correct information about the date of the cuts, nor have any of them received information about their hearing rights. Nor can Defendants abdicate their responsibility for the fate of these 8000 plus individuals, or blame ADHC programs, when Defendants have failed to provide the ADHC programs with adequate time, information, resources, or authority to assist participants whose services are being cut.

Since Plaintiffs meet the standard for a preliminary injunction under *Winter*, Plaintiffs' respectfully request that this Court issue an order that requires Defendants to ensure that Plaintiffs have coverage for Medi-Cal replacement services, or, in cases where that is not possible, a cost-effective community alternative to institutional care – ADHC services 4 or 5 days a week.

II. PLAINTIFFS MEET THE *WINTER* REQUIREMENTS

Plaintiffs have met each *Winter* standard as shown in their opening papers and argued below. *Winter v. Natural Resources Defense Council* 129 S. Ct. 365 (2008).[1].

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[1] Defendants assert that "even if the Plaintiffs can establish the threshold showing on the merits, i.e., a strong likelihood of success. . . . they will be entititled to a preliminary injunction motion only if the balance of hardships tips sharply in their favor." They cite two cases decided before *Winter:*

III. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF AN INJUNCTION

A. Plaintiffs and Class Members Face Irreparable Harm from the Loss of Medicaid Benefits, as a Matter of Law

Plaintiffs cited controlling Ninth Circuit cases that establish that loss of Medicaid benefits constitutes irreparable harm. Plaintiffs' Opening Brief (Pl. Op. Brief) at 11. Defendants have ignored these cases, making no attempt to distinguish them. The named Plaintiffs and *all* other 4-5 day recipients are Medi-Cal beneficiaries who face the loss of 1-2 days a week of necessary medical services, and thus face irreparable harm without any further showing. *Beltran v. Myers*, 677 F.2d 1317, 1322 (9th Cir. 1982); *Beno v. Shala*, 30 F.3d 1057 (9th Cir. 1994); *Edmonds v. Levine*, 417 F. Supp 2d 1323, 1342 (S.D. Fla. 2006).

Defendants argue that harm to Plaintiffs and Class Members is "speculative." They cite *Winter* for the proposition that "a preliminary injunction will not issue simply to prevent the possibility of some remote future injury." *Winter supra,* 129 S. Ct. at 375-376.

The injury to Plaintiffs and Class Members is hardly "remote." The State's cutbacks may deny them needed medical care and other important services. Each of the Plaintiffs and Class Members have been approved by the State of California to receive more than three days of ADHC services based upon medical necessity. The very purpose of the ADHC program and its enabling statute was to prevent and minimize institutionalization. *See,* Pl. Op. Brief at 3-5. The case of *Angotti v. Rexam,* 2006 WL 1646135 (N.D. Cal.)(Wilken, J.) cited by Defendants, is instructive. Judge Wilken recognized that "speculative injury does not constitute irreparable injury." *Id. at* 13. However, the Court specifically held that denial of needed medical care is an irreparable injury. The

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Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. U.S. Department of Agriculture 415 F.3d 1078; and *Lands Council v. McNair* 537 F.3d 981 (9th Cir. 2008) which require alternative tests for preliminary injunctive relief. This alternative test required Plaintiffs to demonstrate either (1) a combination of probable success on the merits and the possibility of irreparable harm, or that serious questions are raised and the balance of hardships tips sharply in Plaintiffs' favor. *Ranchers Cattlemen, Id*. 415 F.3d at 1092; *Lands Council Id*. 537 F.3d at 1003. Defendants wrongfully combine the alternative tests into one stringent standard that misrepresents applicable law.

Court, analyzing *Beltran v. Myers* 677 F.2d 1317, 1322 (9th Cir. 1982) held that, "The Plaintiffs have shown a risk of irreparable injury since enforcement of the California rule may deny them needed medical care. That is a sufficient showing." *Id.* at 12. In *Independent Living Center v. Maxwell-Jolly,* 572 F.3d 644 (9th Cir. 2009) the Ninth Circuit reaffirmed *Beltran* and held that, "Medi-Cal Recipients may demonstrate a risk of irreparable injury by showing that enforcement of a proposed rule may deny them needed medical care." *Id.* at 658.

B. Defendants' Determination of Eligibility Establishes Irreparable Harm

Furthermore, irreparable harm to Plaintiffs and all 4-5 day recipients is established by Defendants' previous determination, after extensive assessment and approval by the State, that "**each** of these individuals **requires adult day health care services…on each day of attendance,** that are individualized and designed to maintain the ability of the participant to remain in the community and avoid emergency department visits, hospitalizations, or other institutionalization" (Cal. Welf. & Inst. Code § 14526.1(d)(5)) and that "A high potential exists for the deterioration of the participant's medical, cognitive, or mental health condition or conditions in a manner likely to result in emergency department visits, hospitalization, or other institutionalization if ADHC services are not provided." Cal. Welf. & Inst. Code § 14526.1(d)(4). *See* Pl. Op. Brief; Declarations in support. Thus, Plaintiffs and Class Members are, by definition, at risk of harm from the ADHC cuts.

C. Plaintiffs' and Class Members' Risk of Imminent, Irreparable Harm is Supported by Ample Evidence

The likelihood of institutionalization is hardly speculative, and is supported by numerous declarants, including Plaintiffs' well-qualified expert, Dr. Gary Steinke. Dr. Steinke, who has been the Chief of Geriatrics Medicine Section at the Santa Clara Valley Medical Center for 23 years and who is a Clinical Professor in the Department of Medicine at Stanford University School of Medicine states that "each of the named Plaintiffs is likely to be institutionalized if the cuts are enacted. (Steinke Decl. ¶¶ 22, 23 and 24; Supplemental Declaration of Gary Steinke, ¶¶ 5, 7-9.) He further states that the availability of ADHC is critical to enabling people at risk of institutionalization to remain home or in the community as long as possible; that the reduction in allowable days of

ADHC will increase utilization of emergency rooms and acute care hospitals; and that a reduction of ADHC services can make a critical difference to Plaintiffs' health. (Steinke Decl. ¶¶ 10, 15, 18.)

Plaintiffs submitted 15 declarations and accompanying exhibits, from two experts, Dr. Gary Steinke and Lydia Missaelides, treating providers, family members, and affected participants. The providers have spoken regarding over 350 known participants who will be harmed.

Defendants' declarant, Rosemary Lamb, based her analysis that named Plaintiffs can be adequately served by three days per week of ADHC services on an incomplete review of Plaintiffs' evidence, including an apparent failure to review the declarations of named Plaintiffs, their family members, and their providers.

D. The Harm to Plaintiffs Outweighs any Budgetary Concerns of the Defendants

In contrast to the harm and suffering to the Plaintiffs and class members which will result from these devastating cuts, Defendants' only potential harm is budgetary concerns. The courts have not given that concern great weight. In *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir.), rev'd in part on other ground, 463 U.S. 1328, 104 S.Ct. 10, 77 L.Ed. 2d 143 (1983), an injunction was granted despite government expenditures of $20 million per month. The Court stated:

> [T]he physical and emotional suffering shown by plaintiffs in the record before us is far more compelling than the possibility of some administrative inconvenience or monetary loss to the government…Faced with such a conflict between the financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in plaintiffs' favor.

Id. at 1437. *Accord, Miller v. Carlson,* 768 F. Supp. 1331, 1339-1340 (N.D. Cal. 1991) (injunction required continued provision of child care despite fiscal cutbacks to program); *Hurley v. Toia,* 432 F. Supp. 1170, 1776 (S.D.N.Y.) *aff'd* 573 f.2d 1291 (2nd Dir. 1977); *U.S. v. Midway Heights County Water District*, 695 F. Supp. 1072, 1077 (E.D. Cal. 1988) (when "preventable human suffering hangs in the balance," preliminary injunction cannot be stayed despite economic hardship to defendant), *Beno v. Shalala*, 30 F.3d 1057, 1069 (9th Cir. 1994) (rejecting budget cutting as grounds for waiver of Federal AFDC requirements.)

Most recently, the Ninth Circuit balanced the hardships between loss of benefits to Medi-Cal recipients and the State's budgetary concerns in light of California's current budgetary situation. *Independent Living Center of Southern California v. Maxwell-Jolly*, 572 F.3d 644 (9th

Cir. 2009). The court held that "we do not doubt the severity of the fiscal challenges facing the State of California." *Id*. 572 F.3d at 699. The court went on to emphasize that, "A budget crisis does not excuse ongoing violation of federal law particularly where there are no adequate remedies other than an injunction." *Id*. 572 F.3d at 699.

Plaintiffs have shown irreparable injury by the denial of medical services as well as other essential ADHC services. The harm to Plaintiffs clearly outweigh any budgetary harm that Defendants may incur, and the budgetary concerns of the State of California does not excuse compliance with due process, the ADA, the Medicaid Act and other provisions of federal law.

E. Plaintiffs Have Demonstrated that the Named Plaintiffs Face Imminent Irreparable Harm and have Established that Class Members Face the Same Harm.

In *Angotti, supra,* the Court held that injunctive relief can be sought on a class-wide basis provided the named Plaintiffs face imminent irreparable harm and there is reason to believe the putative class members face the same harm. *Accord, Mandriguez v. World Savings,* 2009 WL 160213, 3 (N.D. Cal. 2009). The Court in *Angotti* stated that a showing of irreparable harm can be made without individualized showings by individual class members. The court stated that:

> The plaintiffs in *Beltran* and *Newton-Nations* were, by definition, so poor they could not otherwise afford any medical care and therefore the finding that they faced irreparable harm could have been a reasonable inference even without any particularized showings by individual class members. *Id. (citations omitted.)*

IV. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS

A. Plaintiffs Have Shown a Likelihood of Being Unnecessarily Institutionalized in Violation of the ADA and Section 504

1. Plaintiffs will be Forced into Institutions Due to Defendants' Actions and Inaction

Nowhere in their opposition do Defendants dispute that Plaintiffs and class members are eligible for Medicaid and are qualified persons with disabilities within the meaning of the ADA and Section 504.[2] Defendants' position that Plaintiffs have failed to meet the other prongs of an ADA

[2] ADA regulations define disabilities, with respect to an individual, to include "a physical or mental impairment that substantially limits one or more of the major life activities of such individual… such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing,

discrimination claim under *Olmstead* is both legally and factually insupportable.

Defendants assert, without authority, that *Fisher v. Oklahoma Health Care Authority* and *Crabtree v. Goetz* stand for the proposition that the only way to show risk of institutionalization is to show that the only place they can receive needed services is in an institution. Defendants' Opposition (Def. Opp.) at 6-9; *Fisher,* 335 F.3d 1175 (10th Cir. 2003); *Crabtree,* 2008 WL 5330506 (M.D. Tenn., December 19, 2008.) This is simply not correct. *Fisher* involved a situation in which Defendants challenged Plaintiffs' right to bring an *Olmstead* cause of action prior to being institutionalized. The Court of Appeals found that because Defendants' actions would force Plaintiffs into an institution, Plaintiffs had a valid claim under the ADA's integration mandate. "We note, however, that given the Plaintiffs' precarious health and finances, the five-prescription cap places them at 'high risk for premature entry into a nursing home.'" *Fisher* at 1184. Thus, the appropriate inquiry is whether Plaintiffs are at high risk of being forced into institutions because of Defendants' actions or inaction. Here, as in *Fisher* and *Crabtree*, Defendants have reduced services that they previously determined were necessary to avoid institutionalization, without making reasonable accommodations necessary to avoid such an illegal and harmful result. Here, as in *Fisher* and *Crabtree*, such actions violate the ADA and Section 504.

Defendants allege that Plaintiffs have failed to show that the reduction of ADHC services will cause any of them to be institutionalized. Def. Opp. at 6. This is incorrect. First, as a requirement of participation in the ADHC program, Plaintiffs all have been determined to have a "high potential for the deterioration of their medical, cognitive, or mental health condition or conditions in a manner likely to result in emergency department visits, hospitalization, or other institutionalization if ADHC services are not provided." (McCloud Decl. ¶¶ 17, 19, and 29; Exh. B; Davis Decl. ¶¶ 18, 20 and 26, Exh. B, C.)

Additionally, under state law, as a requirement for receipt of ADHC services, Plaintiffs all have been determined to need ADHC services *on each day of attendance*, as set forth in their Individual Plans of Care in order to avoid hospitalization or institutionalization. Cal. Welf. & Inst.

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learning, and working." 28 C.F.R. § 35.104 (1991). The Section 504 requirements are essentially

Code 14526.1(d)(5). (McCloud Decl. Exh. B; Davis Decl. Exh. B, C.) Moreover, Plaintiffs' treating providers and Plaintiffs' medical expert have specifically opined that community-based ADHC is the appropriate option, and institutionalizing them in nursing homes will be dangerous to their health and lives. (Steinke Decl. ¶¶ 21-24; Supp. Steinke Decl. ¶¶ 7, 9; McCloud Decl. ¶¶ 20-26; Davis Decl. ¶¶ 24-25, 27-32.)

Rather than taking into account the abundance of evidence provided to support Plaintiffs' position, Defendants offer the declaration of Rosemary Lamb, a nurse who appears to have no field experience, has no personal knowledge of Plaintiffs, and who from all evidence did not review declarations submitted regarding Plaintiffs, including declarations from the family members who care for them, and know them best.

Ms. Lamb proposes that Ms. Brantley and Ms. Woodard can receive additional IHSS, when, as stated in their caretakers' declarations, they currently receive the maximum hours available under the program, 283. (McLorin Decl. ¶ 10; Gaspard-Berry Decl. ¶ 5; Lamb Decl. ¶¶ 9, 18.) Ms. Lamb proposes that Ms. Brantley can be cared for by family members, when her niece works full-time and will not be able to quit her job to care for her. (McLorin Decl. ¶ 17; Lamb Decl. ¶ 8.) Ms. Lamb proposes that Gilda Garcia is not in need of five days per week of ADHC because her needs can be met by three days per week, despite the declarations of her longtime treating providers to the contrary. (McCloud Decl. ¶¶ 25, 26; Perelman Decl. ¶ 14.)

Defendants point to funds shifted to the Department of Developmental Services (DDS) as support for its claim that Plaintiffs are not likely to prevail on their ADA claim. Def. Opp. 8:22-9:3. Rather, the DDS fund shift demonstrates that for an arbitrary subset of the affected participants -- people with developmental disabilities -- Defendants have acknowledged a continuing need for ADHC or replacement services, without any showing that people with developmental disabilities have greater needs than other Plaintiffs and Class Members. Moreover, the funds are intended "to enable regional centers to provide services set forth in individuals' Individual Program Plans that would be impacted by the ADHC benefit reduction." Def. Opp. 8:26-27. This is precisely the effort

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the same. 28 C.F.R. § 41.32 (1981).

needed by all affected ADHC participants, not just people with developmental disabilities. This fact does not defeat Plaintiffs' ADA claim. Rather, it supports Plaintiffs' position that all affected participants, including those with developmental disabilities, will face harm from a precipitous cut in services, unless and until Defendants take necessary steps to ensure replacement services. Furthermore, Defendants make no showing that even the participants with developmental disabilities have actually received necessary services prior to the ADHC cuts that would prevent their unnecessary institutionalization.

2. Defendants Have Failed to Make Reasonable Accommodations for Plaintiffs to Avoid Unnecessary Institutionalization

Defendants do not address at all Plaintiffs' right to reasonable accommodation under the ADA as interpreted by the *Olmstead* decision. *Olmstead v. L.C. ex rel Zimring,* 527 U.S. 581 (1999). Under *Olmstead,* the integration mandate requires that Plaintiffs receive Medi-Cal services in the community when this desire can be reasonably accommodated, taking into account the resources available to the state and the needs of others with disabilities. *Olmstead* at 527; *see also, Fisher* at 1182. Indeed, Defendants contend that "Plaintiffs can receive all the services they need in the community from various sources," (Def. Opp. at 7), but nowhere do they state how and when the services will be put into place. Defendants can accommodate Plaintiffs' needs because the necessary services are available not only through the ADHC program, but also are covered separately by Medi-Cal programs that have not been cut. Defendants'attempt to place the burden on Plaintiffs and ADHC programs to secure these other Medi-Cal services, rather than acknowledge their responsibility to take steps to ensure provision of the services that the State has determined are needed by Plaintiffs and class members, violates the ADA.

As the single state Medicaid agency, Defendants are responsible for the implementation of the entire Medi-Cal program in California. The "reason for the requirement that a state designate a 'single State agency' to administer its Medicaid program ... was to avoid a lack of accountability for the appropriate operation of the program." *Hillburn v. Maher,* 795 F.2d 252, 261 (2d Cir.1986); 42 U.S.C. §1396a(a)(5). Consequently, the ADHC programs and other community agencies are merely

agents acting in privity with Defendant in providing Medi-Cal funded services. *Emily Q. v Bonta,* 208 F.Supp.2d 1078, 1093 (C.D. Cal. 2001).

Even assuming *arguendo* that Defendants are correct that the remedy Plaintiffs' seek lies in the hands of these local programs, then an injunction against the state defendant, as the principal and single state Medicaid agency, is the way to secure that remedy. Under Fed. R. Civ. P. 65(d), an injunction binds "the parties to the action" and also "their officers, agents, servants, employees and attorneys" plus "those persons in active concert or participation with them who receive actual notice of the order." This rule "'is derived from the common law doctrine that a decree of injunction not only binds the parties but also those identified with them in interest, in privity with them, represented by them or subject to their control'." *Class Plaintiffs v. City of Seattle,* 955 F.2d 1268, 1280 (9th Cir. 1992) *(quoting Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14, 65 S.Ct. 478, 481, 89 L.Ed. 661 (1945).

Plaintiffs have never alleged that ADHC programs do not have responsibility to coordinate with other services. However, ADHC programs have no legal ability to ensure provision of services beyond the ADHC services they in fact provide. (Missaelides Supplemental Decl. ¶ 5.) ADHC programs must refer participants to other services and work with other agencies to coordinate services. *Id.* ADHC programs have no control over eligibility and access to other Medi-Cal services—that control lies with Defendants. *Id.* Defendants have, however, made it impossible for ADHCs and other community agencies to assist affected ADHC participants by their failure to adequately plan, allow sufficient time, or provide clear direction. (Missaelides Decl. ¶11-14.)

B. Plaintiffs Have a Private Right of Action to Enforce the "Methods of Administration" Regulations Implementing Title II of the ADA and § 504.

Plaintiffs have alleged that Defendant is violating Title II and Section 504 by employing methods of administration that have the effect of subjecting them to discrimination on the basis of their disabilities. *See* 28 C.F.R. §§ 35.130(b)(3), 41.51 (b)(3)(i); 45 C.F.R. § 84.4(b)(4) (2005). Defendants contend that Plaintiffs cannot enforce this prohibition because an agency regulation cannot create enforceable rights. Contrary to Defendant's implications, however, the ADA and Section 504 prohibit such discrimination and Plaintiffs have the right to enforce that prohibition.

Congress has expressly provided that Title II of the ADA is enforceable through a private right of action. 42 U.S.C. § 12133, 29 U.S.C. § 794a(a)(2); *see also, Barnes v. Gorman,* 536 U.S. 181, 185 (2002) Moreover, courts have recognized Section 504 and Title II themselves prohibit discrimination that has the effect of denying individuals with disabilities meaningful access to public programs.[3] *See Alexander v. Choate,* 469 U.S. 285, 295 (1985) (holding that "[d]iscrimination against the handicapped was perceived by Congress to be most often the product not of invidious animus, but rather of thoughtlessness and indifference – of benign neglect" and noting that all of the Courts of Appeals have held that section 504 prohibits at least some disparate impact discrimination), *Frederick L. v. Dep't of Public Welf.,* 157 F. Supp. 2d 509, 539 (E.D. Pa. 2001) (holding that Section 504 and the ADA prohibit disparate impact discrimination). Indeed, the Ninth Circuit has recognized that Section 504 prohibits disparate impact discrimination that results from the manner in which a public program is designed. *Mark H. v. Lemahiu,* 513 F.3d 922, 936 (9th Cir. 2008). Here, the essence of Plaintiffs' methods of administration claim is that Defendants have designed the cuts to the Medi-Cal program in a manner that subjects them to discrimination. [4] (Missaelides Decl. ¶¶ 6, 8, 11, 12-14.) Accordingly, the methods of administration regulations construe rights embodied in Title II and Section 504 and are enforceable. *Compare Olmstead v. L.C.,* 527 U.S. 581 (1999) (holding Title II regulation requiring that individuals receive services in the most integrated setting appropriate simply embodied a requirement implicit in the ADA itself and therefore was enforceable through the ADA's private right of action).

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[3] Notably, Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, *or be subjected to discrimination* by any such entity." 42 U.S.C. § 12132 (emphasis added). Similarly, Section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, *or be subjected to discrimination* under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794 (emphasis added).

[4] *See, e.g., Kathleen S. v. Dep't Pub. Welf.*, 10 F. Supp. 2d 460, 471 (E.D. Pa. 1998) (holding that defendant utilized methods of administration that resulted in discrimination against class members by failing to initiate plans sufficiently in advance to ensure necessary community placements within a reasonable time.

Defendant cites *Alexander v. Sandoval* as support for their argument. *Sandoval* concerned a regulation implementing Title VI of the Civil Rights Act and forbidding methods of administration that had the effect of subjecting individuals to race, color, or national origin discrimination. 532 U.S. at 285, *considering* 28 C.F.R. § 42.104(b)(2). The Court held that, unlike the ADA and Section 504, Title VI prohibited only intentional discrimination. Accordingly, because the regulation prohibited conduct that was not prohibited by the statute, the Court held that it could not be enforced through a private right of action. *Id.*

Sandoval, therefore, does not help Defendants.[5] Indeed, the *Sandoval* Court held that when valid and reasonable regulations "authoritatively construe [a] statute itself, [ ] it is [ ] meaningless to talk about a separate cause of action to enforce the regulations from the statute. A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." *Id.*at 284. As explained above, Title II and the Section 504 prohibit the discriminatory design of methods of administration that Plaintiffs attack in this action. Accordingly, Defendant's argument should be rejected.

C. Plaintiffs Have Shown a Likelihood of Success on Their Due Process Claims

Plaintiffs have demonstrated a very strong likelihood of success on their Medicaid and constitutional due process claims, and Defendants' eleventh hour attempts to issue notice have not remedied these defects. Defendants do not dispute that Plaintiffs' interests are protected by the Medicaid statute and regulations and Due Process Clause. Def. Opp. at 11-12.

Defendants also do not deny that they were required to send Plaintiffs and other prospective class members individual notice at least ten days prior to reduction of their benefits, nor do they dispute that individual notice was not provided prior to the filing of this lawsuit. Defendants report that notices were mailed to individual ADHC recipients on August 24 and 25, up to a week after Plaintiffs filed suit. *Id.* (Bailey Decl., ¶ 11, Exh. C.) Such notice was not timely or adequate because it gave the wrong date of the cuts and failed to provide 10 days' notice. Defendants then prepared a second beneficiary notice, but, again, failed to meet the 10-day mailing requirement.

(See, Bailey Decl. ¶¶ 14, 15, indicating that notices were revised on August 28 and submitted for distribution with the September mailing.) As of August 31, when Ms. Bailey signed her declaration, the notices had apparently not yet been mailed, and to date, upon information and belief, no clients have received a second notice with an effective date of September 7, 2009. In any case, a mailing on August 31 would not satisfy the 10-day notice requirement for an effective date of September 7.

Defendants now assert that that Plaintiffs are not entitled to a pre-termination hearing, and that the August 24-25 mass mailing discharges Defendants' obligations under the Medicaid Act and the Due Process Clause. Their argument rests on § 431.220(b) of the regulations implementing the Medicaid Act, which provides that the state agency need not grant a request for a hearing "if the *sole* issue is a Federal or State law requiring an automatic change adversely affecting some or all recipients" (emphasis added). Defendants baldly assert that, in this case, there "is no issue of fact or judgment to be made as to any individual recipient." (Defs.' Opp. at 12.) Yet the rest of their brief contradicts this assertion. Indeed, Defendants agree that Plaintiffs might be entitled to alternative Medi-Cal covered services that would allow them to remain at home and in the community after the ADHC cuts. *Id.* at 8 (citing Lamb Decl. and Zirker Decl. Para 2, Ex. A). As Plaintiffs have shown in their response to Rosemary Lamb's declaration, there are absolutely issues of "fact and judgment" at stake for individuals.[6]

Plaintiffs argued in their opening brief, and Defendants did not deny, that prospective class members have approved TARs determining their medical need for four or five days of services, including services such as skilled nursing, therapies, and personal care covered by other Medi-Cal

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[5] Similarly, *Save Our Valley v. Sound Transit,* 335 F.3d 932 (9th Cir. 2003), also concerns Title VI and similar regulations, accordingly, it is not applicable to this case.

[6] Defendants also cite a section of the state Medicaid manual which explains that the state agency's determination whether a hearing request involves "issues of law or policy, or issues of fact or judgment" will "affect whether a hearing is granted and whether Medicaid will be continued pending the hearing decision." Defs.' Req. for Jud. Not. Ex. C, § 2902.4. This provision is inapposite, as it applies to the state's decisions to grant a request for a hearing and aid paid pending, and not the state's obligation to provide notice of hearing. Moreover, as Plaintiffs have explained, reduction in ADHC services for individuals who otherwise remain eligible for Medi-Cal does involve issues of fact or judgment, and thus a hearing is required.

programs. The three day cap on the ADHC benefit also summarily reduces access to these underlying services, and their replacement could be addressed, if needed, at a hearing.

Plaintiffs and other prospective class members would not know to request such a hearing, however, because the individual notices mailed August 24-25 are inadequate. The generic, three paragraph notice merely states that ADHC benefits will be reduced to a maximum of three days due to the budget. (Bailey Decl., Ex. B, C, E, F.) The notices do not provide recipients with any means to identify or challenge this reduction in underlying services. Adequate notice pursuant to Medicaid requirements requires notice of the right to a hearing and the method by which a hearing may be obtained. 42 C.F.R. § 431.206; *see also* Cal. Code of Regs. tit. 22 § 51014.1(c) (requiring notice to include, *inter alia*, statement of intended action, reason for intended action, and procedure for requesting hearing). The notice mailed to beneficiaries does not even mention the word hearing, much less the services approved in the recipient's TAR or availability of those services through other Medi-Cal programs. The notice fails to meet basic due process requirements.

Defendants' desperate attempt to foist their due process obligations under the Medicaid Act onto the ADHC providers fails. Defendants discuss at length their notices to ADHC providers. *See, e.g.*, Def. Opp. Brief; Bailey Decl. Such notices are not relevant. While ADHC providers have some obligations to assist program participants with case management, those obligations in no way supplant Defendants' own obligations under Medicaid law and regulations and the Due Process Clause. Defendants cannot rely on notice to providers to counter Plaintiffs' due process claims.

V. THE BALANCE OF HARDSHIPS FAVORS PLAINTIFFS

Defendants fail to address balance of hardships. The balance of hardships tips decidedly in favor of Plaintiffs' behalf as well. *Habeas Corpus Res. Ctr. v. United States Dep't of Justice*, 2009 WL 185423, at *5 (N.D.Cal.2009) (after Winter, "[w]hen the balance of harm 'tips decidedly toward the plaintiff,' injunctive relief may be granted if the plaintiff raises questions 'serious enough to require litigation.' "); *see also, Quinault Indian Nation v. Kempthorne*, 2009 WL 734682, at *2 (W.D.Wash.2009).

Decisions of the Ninth Circuit clearly hold that hardships likely to be suffered by Medi-Cal beneficiaries who are forced to go without medical care outweigh any harm to the State in light of its

budget problems. In *Independent Living Center of Southern California v. Shewry*, 543 F.3d 1047 (9th Cir. 2008), the Court held, ". . . when balancing the medical or financial hardship to (Medi-Cal recipients) against the financial hardship to the State that the balance of hardships '*tipped sharply' in favor of the Plaintiffs*." *Id.*, 543 F.3d at 1049 (emphasis added).

The Ninth Circuit reached the same result in *Beltran v. Myers*, 677 F.2d 1317, 1322 (9th Cir. 1982). In *Beltran*, the Plaintiffs were a class of aged, blind, and disabled individuals who were denied Medi-Cal benefits by application of a transfer of assets rule in California. The Court held that by showing loss of the Medi-Cal benefits to the class, the Plaintiffs had demonstrated irreparable injury. The Court further held that when balancing medical hardships to the Plaintiffs' and financial hardship to the State that "the balance of hardships *tipped sharply in favor of the Plaintiffs*." *Id.*, 677 F.2d at 1322 (emphasis added); *see also*, *Rodde v. Bonta*, 357 F.3d 988, 999 (9th Cir. 2004).

Generally, in Medicaid cases, "[t]he nature of their claim – a claim against the state for medical services, makes it impossible to say that any remedy at law could compensate them." *McMillan v. McCrimon,* 807 F.Supp. 475, 479 (C.D. Ill. 1992); *Caldwell v. Blum*, 621 F.2d 491, 498 (2nd Cir. 1980), *cert. denied,*452 U.S. 909 (1981) (Medicaid applicants established irreparable harm were they would, "absent relief, be exposed to the hardship of being denied essential medical benefits"). Because Medicaid beneficiaries by definition "have income and resources…insufficient to meet the costs of necessary medical services" (42 U.S.C. § 1396(1)), they have no recourse when the state denies essential care.

VI. THE PUBLIC INTEREST STRONGLY FAVORS THE GRANT OF AN INJUNCTION

"The public interest is a factor to be strongly considered" in granting a preliminary injunction to assure that Medicaid recipients receive essential medical services. *Lopez v. Heckler*, *supra,* 713 at 1437 (9th Cir.), rev'd in part on other ground, 463 U.S. 1328, 104 S.Ct. 10, 77 L.Ed. 2d 143 (1983). The Supreme Court has already characterized medical care as a "basic necessity of life." *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 259, 261, 94 S.Ct.

1076, 39 L.Ed.2d 306 (1974) ("The denial of medical care is all the more cruel in this context, falling as it does on indigent who are often without the means to obtain alternative treatment").

Here it is in the public interest to enforce federal law to effect Congress' purpose in enacting Medicaid protections and is not in the public interest to flout the law. *United States v. Odessa Union Warehouse Co-Op*, 833 F.2d 172, 176 (9th Cir. 1987). The Ninth Circuit recently balanced the equities and the public interest in a case involving cuts to rates to Medi-Cal providers. In *Independent Living Center v. Maxwell-Jolly, supra,* the court held that although there is a public interest in ensuring the State has enough money to meet its financial obligations, this interest was outweighed by the public interest in ensuring access to health care. The Court stated, "We do not doubt the severity of fiscal challenge facing the State of California. State budgetary concerns cannot however be the conclusive factor in decisions regarding Medicaid." *Id.*, 572 F.3d at 699. The court further held that state budgetary concerns were not a critical public interest. The court said, "State budgetary concerns do not therefore, in social welfare cases, constitute a critical public interest that would be injured by the grant of preliminary relief." *Id.* at 659 (emphasis added). The court contrasted Plaintiffs rights to health services with the state's budgetary concerns, "In contrast, there is *a robust public interest* in safeguarding access to health care for those eligible for Medicaid." *Id* at 659 (emphasis added). The public interest favors Plaintiffs in balancing equities and the public interest.

VII. CONCLUSION

Plaintiffs respectfully request entry of a Preliminary Injunction.

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Respectfully submitted,

DISABILITY RIGHTS CALIFORNIA

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