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IN THE UNITED STATES DISTRICT COURT FOR

THE EASTERN DISTRICT OF CALIFORNIA

LESLIE NAPPER, et al.,

Plaintiffs,

vs.

COUNTY OF SACRAMENTO, et al.,

Defendants.

Case No. 2:10-CV-01119-JAM-EFB

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Date: July 21. 2010
Time: 9:30 am
Place:Courtroom 6, 14th Floor
Judge:Hon. John A. Mendez

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I.

INTRODUCTION

Plaintiffs challenge the adequacy of the County's restructured Adult Outpatient Mental Health Services system (System), contending that it will result in the deterioration of consumers' mental health with a resultant increase in consumer institutionalization. The County's restructured System will offer mental health services through County-operated clinics and programs rather than through contractor-operated facilities known as Regional Support Teams (RSTs).

The overarching failure of Plaintiffs' challenge is that it is premised on a set of erroneous assumptions that have not come to fruition. The County is implementing a System that is different than that alleged in either the unamended Complaint or the Motion for Preliminary Injunction. The requested preliminary injunction requires the Court to leapfrog to a conclusion for which no evidentiary basis exists.

II.

STATEMENT OF FACTS

A. Previous System

Under the previous System, the County provided outpatient mental health services previously through four (4) RSTs and other contractor-operated programs.[1] The services provided by these RSTS were not necessarily provided in the same manner. There were two important areas of differences. First, there were differences in staffing patterns across the RSTs. Second, the staffing differences resulted in differences in how services were delivered. (Zykofsky Decl.)

For example, some RSTs gave medication appointments, while others had more drop in appointments. El Hogar historically did more outreach and in-home services.

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[1] The existing four (4) RST programs are: El Hogar RST, Visions Unlimited RST, Turning Point Northgate Point RST, Human Resource Consultants (HRC) RST. The five (5) additional providers of outpatient services are; HRC T-CORE, Consumer Self Help Wellness Recovery Centers (North & South sites) (WRC), and the County-operated T-CORE Adult Psychiatric Support Services (APSS), and T-CORE APSS Aftercare.

Northgate Point had more involvement of its medical staff in directing services on its multidisciplinary approach. Some RSTs, such as Visions, historically utilized more clinical licensed staff than did HRC, whose staffing was built around consumer employee staff and paraprofessional staff. (Zykofsky Decl.) The RSTs utilized Personal Services Coordinators (PSCs) who were, in some cases, "peers" (consumer employees), unlicensed staff with life experience involving mental health issue, or paraprofessional staff providing direct services based on a variety of work experiences.[2] (Zykofsky Decl.)

B. County's Hybrid Plan as Adopted by Board of Supervisors

The County was facing a $180 million budget shortfall for fiscal year 2010-11, a portion of which was attributable to the Division of Behavioral Health Services (BHS). Accordingly, BHS began looking at re-allocation of limited resources among its mental health programs. (Bennett Decl.)

Realignment funds which had historically funded the RSTs were transferred to the inpatient components of the County's mental health system to accommodate shortages and pent-up community demand for inpatient beds. (Bennett, King Decls.) Utilizing revenues from the Mental Health Services Act (MHSA), the County recommended, and the Board of Supervisors approved on June 17, 2010, a restructured System. (Bennett Decl.)

The use of MHSA funding allowed the County to develop a restructured System that continues the same menu and level of services. (Bennett, Kennedy, King, Zykofsky Decls.) In fiscal year 2009-10, the Adult Mental Health Outpatient program, excluding the Full Service Partnership (FSP) program had budgeted expenditures totaling $18.6 million ($8.7 million for RSTs, $2.3 million for WRC, and $7.6 million for APSS/Aftercare and HRC TCORE). In fiscal year 2010-11, the budgeted expenditures total $15.1 million ($11.3 million for the Sacramento Wellness Centers, $.9 million for

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[2] In the Mental Health Plan (MHP), unlicensed staff, whether they are consumer employees or paraprofessionals, work under the direction of licensed staff regarding the delivery of direct mental health service.

WRC, and the $2.9 million in transition funding). Upon approval by the State after a community process, the budgeted amount will include another $2.5 million in additional MHSA funding for HRC TCORE which will make the budgeted amount for 2010-11 $17.6 million. It is anticipated that, based on HRC TCORE plan, an additional $1.0 million in FFP will be realized for a total 2010-11 budgeted amount of $18.6. This amount is equal to the amount budgeted for 2009-10. (King Decl.)

Under the restructured System, four (4) County-operated Sacramento Wellness Centers will replace the four (4) contractor-operated RSTs. In addition, contracted peer services that are both clinic and community-based will be used. Thus, the Board of Supervisors approved a blended system of services (Hybrid Plan). (Zykofsky, Weaver, Kennedy Decls.)

Under the Hybrid Plan, the County will provide integrated recovery-focused services at Sacramento Wellness Centers in partnership with the WRC and HRC/TCORE. The Wellness Centers, which are largely funded with MHSA dollars, are designed to comply with the five essential elements of the MHSA: community collaboration, cultural competence, client driven services, wellness focus and integrated services. The Hybrid Plan will offer the same menu and level of services that the County previously offered to these beneficiaries; it will offer the same level that is documented in the consumer's care plan. (Zykofsky Decl.)

The Sacramento Wellness Centers are located in facilities that are near the existing RSTs. They will be located at the following sites: 1) 3815 Marconi Avenue;[3] 2) 3950 Research Drive;[4] 3) 7171 Bowling Drive;[5] and 4) 2130/2140 Stockton Boulevard.[6] The Sacramento Wellness Centers are located along bus lines or light rail stations. Consumer

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[3] The Marconi Avenue site is 1.27 miles from HRC. (Weaver Decl.)

[4] The Research Drive site is 2.15 miles from NGP and 7.46 miles from El Hogar. (Weaver Decl)

[5] The Bowling Drive site is .57 miles from Visions-South and 20.03 from Visions-Galt. (Weaver Decl.)

[6] The Stockton Boulevard site is 5.13 miles from El Hogar. (Weaver Decl.)

clients of the RSTs will be assigned to a Sacramento Wellness Center that is closest to their residence, but may request an alternative site which will be accommodated if possible. (Weaver Decl.)

HRC-TCORE will be co-located at the Wellness Centers and will provide community-based peer support, assessment and rehabilitation services. WRC will provide site-based services at the Wellness Centers, utilizing peer mentors who will provide individual and group supports.[7] The HRC-TCORE drop-in services will continue to be offered at the existing Marconi location. The County will co-locate at that site and will bring in a clinical piece to provide a full array of services.

The Sacramento Wellness Centers will consist of support teams composed of members of blended County and contractor staff. The teams will consist of both clinicians and peer specialists. The RSTs used both a medical model and a recovery model. The Sacramento Wellness Centers will do the same. (Zykofsky Decl.)

The County's System is committed to the recovery model which the County previously required its contractor providers to implement. The Wellness Centers will use a multidisciplinary team approach that includes psychiatrists, nurses, licensed clinical staff, master-level clinical staff, mental health workers and peer support staff. Services will include comprehensive assessment, crisis intervention, service coordination, individual and group services (educational and therapeutic), benefit acquisition, vocational supports, medication support and education, co-occurring substance use/abuse services, peer support services (individual and group), health care linkage, field-based service including in-home assessments and rehabilitation services, community self-help referrals and family interventions and supports. (Weaver, Kennedy, Zykofsky Decls.)

There will be a total of 67.6 FTE County employees assigned to the Sacramento Wellness Centers. County staff assigned to the Wellness Centers have language

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[7] Under the contractor-operated system, the WRC offered peer-run drop-in support. It also had a medication component that the County will be assuming under the Hybrid Plan. (Weaver Decl.)

capabilities in a number of languages, ranging from Spanish to Tagalog to Hmong.[8] Of those, 50.6 FTEs are mental health professionals;[9] the others are administrative staff. (Weaver, Kennedy Decls.) In addition, there will be at least 15 contracted psychiatrists.[10] (Kennedy, Weaver, Hales Decls.) The County-staffed component of the Wellness Centers will rely upon licensed and unlicensed Master level mental health professionals, as well as nurses and mental health workers who have worked either at the Adult ACCESS Team, APSS clinic, APSS Aftercare Clinic, children's mental health services and/or SMHTC. They have a wide variety of experience in working with the seriously mentally ill in Sacramento. (Zykofsky Decl.)

Staff assigned to the Wellness Centers will also be provided training in a range of areas, including but not limited to MHSA principles and philosophy; Wellness, Recovery and Resiliency; Cultural Competence; Integrated Service Provision; and Documentation standards.[11] Just as with the rest of the service provider system, Wellness Center staff will receive training to continuously build core skills for direct services staff in all these areas. (Zykofsky Decl.)

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[8] The County staff assigned to the Wellness Centers has the following language capabilities: French, Spanish, Trianya, Indian/Pakistan dialects, Tagalog, Cubuano, Philippino dialect, Creole African Dialect, Mandarin, Vietnamese, Taiwanese and Hmong. In addition, the contracted staff working at the Wellness Centers have the following language capabilities: Russian, Spanish, Japanese, Laos, Thai and Hmong. To the extent that there is a language need that is not available from staff, the Wellness Centers will utilize the Assisted Access services, which is what the RSTs currently also utilize. (Zykofsky Decl.)

[9] Some have worked in the County system and some have worked at the RSTs and/or other community providers and bring additional experience with adult clients. All have exposure and understanding of mental health issues and challenges. The staff is coming directly from mental health services programs, not from parts of the County in which their work did not involve any mental health services. They are coming from positions in which treatment has been provided; they have been seeing and serving mentally ill consumers and their families. (Zykofsky Decl.)

[10] Sixteen psychiatrists in the community have signed, or are in the process of signing, personal services contracts with the County of Sacramento to provide clinical services at the new Wellness Centers. Three of the four current medical directors at the RSTs will gradually transition their services from the RSTs to the Wellness Centers, with one becoming medical director at the Wellness Center located on Marconi Avenue. The fourth medical director, a psychiatrist-family physician, will be providing both medical and psychiatric services at a new county-operated Federally Qualified Health Center (FQHC). (Hales Decl.)

[11] Input was sought and received from community partners in development and delivery of this training. (Zykofsky Decl.)

There will also be 34 contracted case managers, 12 contracted peer mentors, 5 peer partners and a psychologists and Post doctoral contracted. Peer mentors will be providing services at each Sacramento Wellness Center via a contract with HRC/TCORE. There will be 4 peer mentors per site, for a total of 12 peer mentors at three sites. The fourth site will have peer services provided by 5 Peer partners from another contract. The peer mentors will not carry a caseload, but will focus on services designed to strengthen consumer independence and community engagement and connection, such as group therapy. (Kennedy Decl.)

There will be four teams per Wellness Center, each team serving between 250-375 consumers. This assumes a capacity of 1500 clients per Wellness Center.[12] The staff to consumer ratio at the Wellness Centers (which consists of nine consolidated programs) will be a range of approximately 1:75 to 1:90.[13] (Weaver Decl.) In contrast, the staffing ratio at the RSTs was 1:70 (if based only on their open active caseloads) or 1:75 (if based on contract requirements). The difference is that the RST staffing ratios do not include the full gamut of clients who will be served at the Wellness Center and who are included in the County's 1:70 ratio. (Weaver Decl.) The ratios for the RSTs and the Wellness Centers are not comparable because they will be comprised of different consumer populations.

C. County's Transition Plan

The County's previous contracts with the RSTs expired on June 30, 2010, by their own terms. (Bennett Decl.) The County is contracting with the RSTs for a four month period. In July, funding and services will remain the same as under the previous

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[12] Unlike the RSTs which had a capacity of 900 (which was not actually fully realized), the capacity of the Wellness Centers include the RST consumers, the consumers using the peer support services of WRC, the APSS/Aftercare Clinic, and medication-only services. (Weaver Decl.)

[13] This staff to consumer ratio is different than that which was identified in the Board of Supervisors staff report because, since then, the data in the AVATAR system was further refined by both County staff and provider staff. The range of 1:75 to 1:90 reflects serving the maximum number of consumers and assumes that 6,000 is the maximum capacity. (Weaver Decl.)

contracts. Commencing in August, the transition of actual cases will commence. (Bennett Decl.)

Approximately 4,116 clients (exclusive of APSS/Aftercare Clinic) will be transferred from the RSTs, WRC South, and HRC/TCORE commencing in August 2010. Under the County's transition plan, developed in conjunction with the RSTs approximately 90-110 clients per week will be transferred, with an anticipated completion date of September 30. However, there will be an additional month (October) in which the transition can also occur. These numbers contemplate the transfer of approximately one and a half caseloads per week which will enable a provider to titrate their staffing needs as they have fewer clients to serve weekly. (Weaver Decl.)

The RSTs are expected to identify clients with special needs and to describe the special need, such as injectable medications, urgent care needs, housing issues, homebound and similar needs. They are expected to coordinate the client's appointment at the Wellness Center, including phone contact and coordination of the upcoming appointment with County staff. (Weaver, Zykofsky Decls.)

In order to ensure that the consumers with the most critical needs are connected to the Wellness Centers, when the County receives the RSTs' list of consumers to be transferred, it will immediately focus on contacting the identified special needs consumers. Appointments will be set up with consumers who are monolingual. Appointments will also be established for those receiving injectables. Phone calls to the consumers will be made to facilitate their transfer to the assigned Wellness Center. (Weaver, Zykofsky Decls.)

The County has also developed a communication plan relating to the transition process. County staff will be available to begin the engagement process at the RSTs beginning in July and has offered to be available on site to meet with consumers and set

appointments as necessary.[14] Letters will also be sent to consumers with follow-up phone calls. In addition, each of the Wellness Centers will have on-going orientation groups throughout the transition period so as to provide clients with an opportunity meet staff and tour the new facility. (Weaver, Kennedy Decls.)

III.

SUMMARY OF ARGUMENT

Plaintiffs bear a heavy burden, which they fail to meet, on their Motion for Preliminary Injunction. They must show that: (1) they are likely to prevail on the merits, (2) without the injunction, they will likely suffer irreparable harm, (3) the balance of the harms favors granting the motion, and (4) the public's interest is served by granting the motion. *Guzman v. Shewry*, 552 F.3d 941, 948 (9th Cir. 2009).

Plaintiffs' action must fail in that it is based entirely upon a hypothetical house of cards, i.e. a plan that was never recommended, adopted or implemented by the County. To the contrary, the Board of Supervisors approved the Hybrid Plan which is a blend of County-operated and contractor-operated services.

The Hybrid Plan contains all of the elements that Plaintiffs claim are critical to a successful service delivery model. It provides for a transition period, a communication plan, a delivery system that includes both clinical and peer services, and notification to consumers. Most importantly, the Hybrid Plan provides the same menu of services as that provided under the prior contractor-operated model.

What it does not provide, is maintenance of a System that perpetuates the provision of services by the same RST providers. However, there is no authority that dictates who is required to provide adult outpatient mental health services in the County. Because Plaintiffs show no chance of success on the merits, the inquiry ends and the

[14] As yet, the RSTs have not responded to this proposal. (Kennedy, Zykofsky Decls.)

"injunction should not issue." *Arcasmuzi v. Continental Airlines, Inc.*, 891 F.2d 935, 937 (9th Cir. 1987).

Plaintiffs' request for injunctive relief is further defective because they have not demonstrated the requisite immediate, threatened injury. *Caribbean Marine Services Co., Inc. v.* Aldridge 844 F.2d 668, 674 (9th Cir. 1988); *Mandrigues v. World Savings Inc.* 2009 WL 160213 (N.D. Cal. 2009). For an injunction to issue, the threat must be shown by probative evidence. *Bell Atlantic Business Systems, Inc. v. Storage Technology Corp.* 1994 WL 125173 (N.D. Cal. 1994). Conclusory affidavits are insufficient. *American Passage Media Corp. v. Cass Communications* 950 F.2d 1470, 1473 (9th Cir. 1985).

No probative evidence of an immediate, threatened injury has been submitted. Plaintiffs' declarations demonstrate only that consumers fear change.[15] However, such fears are not probative evidence of injury. The litany of "what ifs" articulated by Plaintiffs is speculative and without any basis in reality. There is absolutely no evidence demonstrating that a provider change will lead to an increased probability of institutionalization or any other type of injury. To the contrary, the incidence of adverse incident reports this year is no greater than the previous year. (Zykofsky Decl.)

Irreparable injury must be "*likely* in the absence of the injunction." *Winter v. Natural Resources Defense Council, Inc.*, __ U.S. __, 129 S.Ct. 365, 375 (2008) (emphasis added). The mere "possibility of future injury" is not enough. *Garden v. City of Moreno Valley* 687 F.Supp.2d 930, 937 (C.D. Cal. 2009). Fears, insecurities and

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[15] This is not the first time that there has been a transition of providers within Sacramento County. From 1991-93, the County went through another major redesign and went from 8-9 adult outpatient providers to 3 contracted RSTs. At the time, there was substantial fear and concern by consumers about this transfer. At the time, many consumers did not want the transfer to occur, for the same reasons as are now being expressed: fear and disruption of a working relationship between the consumer and the treating professional. However, at that time, all providers put client care as their first and foremost obligation and collaborated to make the best transfer of care possible. It did occur. Similarly, in 1997, as a result of high caseloads, the County needed to create an additional RST. Northgate Point RST was created. The County transferred clients from the other three RSTs to Northgate. Consumers again expressed fears and concerns and did not want this change. Nevertheless, the change occurred and clients were successfully transferred. Client safety and care were foremost in the mind of both County and provider staff. (Zykofsky Decl.)

loyalty to existing contractor providers do not satisfy that standard. There must be some realistic "threat" or "danger" that the injury will occur.

One case in which plaintiffs prevailed on a request for preliminary injunction is illustrative of why Plaintiffs here must fail. In *Rodde v. Bonta*, 357 F.3d 988 (9th Cir. 2004), the County of Los Angeles had approved a plan to close the county's Rancho hospital. *Id* at 992. That hospital was the only hospital in the area that provided an array of unique services to the disabled population of the county. *Id* at 991-992. The court issued an injunction because the closing of Rancho was imminent and, with its closure, disabled residents of the County would have been left without any services. *Id* at 993. However, the injunction only barred the County from closing Rancho until it demonstrated that it proposed to provide Rancho's services elsewhere.[16] *Id* at 994.

The facts of the instant case are in stark contrast from those with which the *Rodde* court was confronted. Sacramento County adopted a plan that provides, at County-operated clinics, the same types of services to the same consumer population as were previously provided by the RSTs. There is no closure or reduction of services. There is only a relocation of the consumer population to different (but proximate) locations, with services being provided by a mix of County staff and contracted peer staff, rather than solely by contractor staff. While the composition of the staff providing the services will differ, the restructured clinics will continue to include peer supports as well as many of the psychiatrists that were providing services at the RSTs. (Hales, Weaver, Kennedy Decls.) The array of services will remain the same and will continue to be provided in accordance with the individual needs assessment of the consumer. (Weaver, Zykofsky Decls.)

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[16] The court in *Harris v. Board of Supervisors*, 366 F.3d 754 (9th Cir. 2004) reached the same conclusion, the only distinction being that the *Harris* court grappled with a larger approved cut to services. The court found that the County's inability to deliver medical treatment was not speculative based on the actual reduction of services on the scale proposed. The absence of any alternative facility made it "fairly certain that when plaintiffs do seek those services, they will not be available." *Id.* at 763. In contrast, the County's Hybrid Plan does not reduce or eliminate services, but shifts responsibility for the provision of those services to a County-operated system. There is no evidence that the services will be unavailable, reduced or discontinued.

Thus, unlike *Rodde*, services will continue to be available to the same population as is currently receiving those services at the RSTs. The gist of Plaintiffs' Complaint is not that services are being eliminated, but that they are being provided directly by the County, as opposed to contractors. There is no case authority which requires that mental health services be provided in perpetuity by the same providers at the same location. Distrust of a County-operated system and a desire to maintain relationships with existing providers do not satisfy the requirements for a preliminary injunction. Fear of change is not an adequate basis for injunctive relief. Given the comprehensive nature of the County's transition plan, as well as the comparability of the funding allocated to the Hybrid Plan in comparison to the funding for the RSTs last fiscal year, Plaintiffs' litany of drastic declines in mental health services and increased institutionalization is neither rational nor foreseeable

Plaintiffs seek to convince this Court that it should oversee and administer the County's System by dictating what constitutes a proper transition period, who is the best provider of services, what is the best service model for the provision of such services, how medical charts should be transferred between providers. These and similar issues are more properly left in the hands of the County, not the Court.

IV.

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION SHOULD BE DENIED BECAUSE PLAINTIFFS' COMPLAINT IS MOOT

Plaintiffs' Complaint and Motion for Preliminary Injunction are based upon a service delivery model that was never implemented by the County. As such, Plaintiffs are asking this Court to rule on a non-existent, unimplemented system. Plaintiffs' Complaint and Motion are moot.

Plaintiffs are asking the Court to rule on a proposal that was never recommended, submitted or approved by the Board of Supervisors. Nor have Plaintiffs amended their

Complaint or their Motion to address the Hybrid Plan.[17] As such, there is no effective relief that can be granted.

A federal court has no authority to render opinions upon moot questions. An actual case in controversy must be extant at all stages of review. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). A case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979).

The central issue in any mootness challenge is whether changes in the circumstances existing when the action was filed have forestalled any meaningful relief. *West v. Secretary of Dept. of Transp.*, 206 F.3d 920, 925 (9th Cir. 2000). Without meaningful relief, any opinion as to the legality of the challenged action is advisory. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000). Federal courts have no power to render advisory opinions and should avoid being drawn into disputes that are abstract or hypothetical. *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240 (1937).

Plaintiffs allege that the County intends to cut off outpatient mental health services at the RSTs with an unformulated plan of transition. (Complaint, Paras. 1-4, 72) Regardless of the accuracy of that allegation when it was initially made, the proposal on which Plaintiffs have premised their action is no longer on the table. It was never even recommended or submitted to the Board of Supervisors for consideration. Thus, Plaintiffs' Complaint and Motion are based on a non-existent hypothetical proposal.

When their preliminary injunction motion was filed, there was no proposal before the Board of Supervisors. In fact, County staff was still assessing several possible alternatives. (Bennett Decl.) Plaintiffs, unwilling to wait until the Board acted on a specific proposal, filed for preliminary injunction before the matter was ripe.

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[17] In fact, the Joint Rule 26(f) Status Report filed by the parties reflects that Plaintiffs do not intend to amend their Complaint.

The staff report recommending the Hybrid Plan that was ultimately approved by the Board of Supervisors contained extensive information and details regarding the locations of the Wellness Centers, services, staff, and timing of clients' transitions from the RSTs to the County-run Wellness Centers. The Board did not adopt an unformulated redesign with an abrupt cut in services. To the contrary, the Hybrid Plan addresses the very issues which Plaintiffs have alleged must be addressed before *any* redesign should be implemented. Those issues include: continuation of mental health services to consumers, provision of services by peers, accessibility of sites, development of a transition plan and an extended transition period.

Because the proposal which is the basis of Plaintiffs' Complaint and Motion has not been adopted or implemented, the Court is being asked to rule on a non-existent, hypothetical situation. The "case and controversy" alleged by Plaintiffs is moot. This Court should not issue an advisory opinion based on a set of non-existent facts. Plaintiffs' Motion should be denied as there is no meaningful relief that can be granted.

V.

THE COURT LACKS AUTHORITY TO REQUIRE THE COUNTY TO ENTER INTO NEW CONTRACTS WITH THE RSTS

Plaintiffs seek to enjoin the County from "terminating or reducing the funding" for the RSTs. However, such relief essentially requires the County to enter into new contracts with the RSTs. The contracts under which the RSTs previously provided services expired on their own terms on June 30, 2010. (Bennett Decl.) The Court does not have authority to require the County to execute or renew such contracts.

A public entity's award of a contract, and all of the acts leading up to the award, are legislative in character. *Santa Ana Tustin Community Hospital v. Bd. of Supervisors* 127 Cal.App.3d 644, 652 (1982). The ultimate question of whether to contract with a particular provider for particular services and the amount payable therefore is a purely political one and is shaped by discretion and public policy. The determination to award a contract to a particular contractor involves interdependent political, social and economic judgments.

Therefore, the approval of the contracts is inherently legislative in character. *Id.*

Even was this Court to conclude that the County's Hybrid Plan is unlawful, such a determination does not necessarily require the County to maintain a contractual relationship with the RSTs once that relationship has been terminated. The decision as to whether and with whom to contract for outpatient services rests exclusively within the purview of the Board of Supervisors. Legislative discretion is, absent special circumstances, not subject to judicial control and supervision. *Mike Moore's 24-Hour Towing v. City of San Diego* 45 Cal.App.4th 1294, 1305 (1996); *Joint Council of Interns & Residents v. Bd. of Supervisors* 210 Cal.App.3d 1202, 1213-1214 (1989). For that reason, this Court lacks authority to mandate legislative action such as the execution of new contracts with specific providers.

VI.

PLAINTIFFS HAVE FAILED TO RAISE A JUSTICABLE ISSUE.

A federal court may not consider matters where a plaintiff lacks standing to pursue the matter. U.S. Const. Article III, §2. For standing to exist, there must be an actual case in controversy. *SEC v. Medical Committee for Human Rights* 404 US 403, 407 (1972). Plaintiffs have failed to satisfy the three part test set forth by the Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Under that test, 1) a plaintiff must have suffered an "injury in fact," i.e. an injury that is "(a) concrete and particularized and (b) actual and imminent, not conjectural or hypothetical;" 2) there must be a causal connection between the injury and the complained of conduct; and 3) it is "likely" and not merely "speculative" that a favorable ruling will address the injury. *Id.* A plaintiff has the burden of proof and must satisfy each of the three parts of the above described test. *Id.*

Plaintiffs do not satisfy the first prong of this test. Consequently, they cannot demonstrate that they meet the second and third prongs of the test. Plaintiffs' failure stems from the undeniable fact that their entire Complaint is based on a series of events,

speculation and assumptions that pre-date submission of any proposal to the Board of Supervisors, let alone the approval of the Hybrid Plan. Plaintiffs' declarations, whether by the named Plaintiffs, other consumers or their "experts," are premised on a non-existent, unadopted and unimplemented proposal.[18] Plaintiffs have failed not only to address what the Board of Supervisors actually approved, but to demonstrate that they have had, or will have, **any actual injury** caused by the Hybrid Plan. Because Plaintiffs' Complaint and Motion are based on a future event that never materialized, they have failed to establish Article III standing.

VII.

PLAINTIFFS CANNOT SUCCEED ON THE MERITS BECAUSE THE HYBRID PLAN IS LEGAL

Plaintiffs have no chance of success on the merits of their claims. The Hybrid Plan is not legally deficient, nor does it suffer from any of the alleged deficiencies of the unrecommended, unadopted and unimplemented proposal referenced in Plaintiffs' Complaint and Motion. The Hybrid Plan continues the same menu of services and the same service levels that were previously provided by the RSTs. The primary difference is that the services are provided at different locations and by different providers.

A. The Hybrid Plan Does Not Violate the ADA's Integration Mandate

The ADA's "integration mandate" is the crux of Plaintiffs' case. Under the integration mandate, a public entity is required to administer services, programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities. 28 C.F.R. §41.51(d). The unjustified isolation of persons with disabilities is a form of discrimination prohibited under the ADA and Section 504 of the

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[18] Following approval of the Hybrid Plan, Plaintiffs submitted three (3) declarations. The declaration by their "expert" (Beth Stoneking) primarily disputes the use of clinical as opposed to peer staff in a recovery model. However, the appropriate composition of clinical and peer staff, as well as the treatment modality implemented, is hardly an actionable matter.

Rehabilitation Act.[19] *Olmstead v. L.C. ex rel Zimring* 527 U.S. 581, 597 (1999). The *Olmstead* court disavowed any intent to hold that the ADA imposes either a particular standard of care or a requirement that disabled persons be provided a particular level of benefits. *Id.* at 603, n. 14.

Plaintiffs' primary argument is that the shift in providers and provider sites will cause consumers to decompensate because there will be a break in services. Complaint, Para.84. This argument has the same flaws as the rest of Plaintiffs' claims: it is speculative and unsubstantiated by any credible facts. As with all of Plaintiffs' assertions, this has no factual predicate and is pure speculation. Plaintiffs' unsubstantiated fears and assertions are based on a proposal that was never recommended to, or approved by, the Board of Supervisors. The "transition plan" alleged in the Complaint does not accurately reflect the plan actually adopted.

No factual predicate exists for Plaintiffs' proposition. Plaintiffs have not shown any nexus between the Hybrid Plan and the potential for institutionalization. The declarations submitted by Plaintiffs demonstrate only fear of change, not a real or imminent risk of institutionalization.

Courts have previously held that when a state entirely eliminates certain essential services to the continued health of disabled individuals, those individuals are at a severely increased risk for institutionalization. *V.L. v. Wagner,* 669 F.Supp.2d 1106, 1119-1120

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[19] In view of the similarity between the relevant provisions of the ADA and Section 504 of the Rehabilitation Act, courts construe and apply them in a consistent manner. *Frederick L v. Dept. of Public Welfare of Penn,.* 364 F.3d 487, 491 (3d Cir. 2004).

(N.D. Cal. 2009).[20] However, unlike the situation in *Wagner*, the County is not cutting off services and leaving Plaintiffs to hang in the wind without the supportive services that allow them to function within the community.

To the contrary, those services will continue to be offered. Plaintiffs will merely receive those services at another location and from another provider. With the assistance of the RSTs, consumers will be transitioned over three months to the Wellness Centers. (Weaver, Kennedy, Zykofsky Decls.)

The provision of the same menu of mental health services by a new provider does not, and cannot, realistically violate the integration mandate. Nothing in the integration mandate requires that services be provided in perpetuity by the same provider or in the same manner. To hold otherwise would mean that a service delivery system could never be modified or changed.

Plaintiffs contend that the County's transition period is legally deficient.[21] However, the County has devoted substantial time and effort to the transition plan. (Weaver, Kennedy Decls.) It has been engaged in a lengthy planning process both prior to submittal of a recommendation to the Board of Supervisors and after the approval of the Hybrid Plan. Planning began in March 2010. Focus Groups were conducted with the mental health community and the RSTs. (Weaver Decl.) As the availability of funding sources was clarified, the County modified its plan. Finally, in conjunction with the

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[20] In *Wagner*, recipients of in-home care under the California In-Home Supportive Services (IHSS) program challenged cuts in eligibility for program benefits as violative of the disability statutes on the basis that it would expose them to potential institutionalization. *Id.* at 1009. In an effort to address a fiscal crisis, the State cut critical in-home support services for over 100,000 disabled and elderly individuals. *Id.* at 1111. The plaintiffs presented substantial evidence that the cuts would cause the mentally disabled receiving IHSS services to lose the assistance to remind them to take medication and to attend medical appointments, and as well as the assistance to perform essential tasks to continue their independent living; placing those individuals in serious risk of being forced to move out of their homes and to the less integrated setting of institution. *Id.* at 1119, 1120. The defendants argued that family members or other community support services could be found in order to fill the gaps left by the reduction in the IHSS program. *Id.* at 1120. The court found that the complete termination of services violated the integration mandate, because it exposed those no longer receiving services to a serious risk of institutionalization. *Id.*

[21] Plaintiffs never bother to explain to the Court how to calculate such a time period. Does it start the moment a plan is developed? Has the transition period begun the moment a new site is selected? Or does it only begin when the first patient is transferred? Plaintiffs give no answer to these questions. Therefore, it is impossible to give much consideration or credence to the arbitrary "six month" period described by the Plaintiffs experts.

2010-11 budget, the Board of Supervisors approved the recommended Hybrid Plan.

An implementation period was built into the Hybrid Plan. The RSTs would continue to operate at the same levels in July, but in the subsequent three months, there would be a phased transition of clients to the Wellness Centers. The reality is that, for plaintiffs, no transition period would be adequate. What Plaintiffs really want is to maintain the existing system in perpetuity. The length of any transition period is a uniquely administrative decision in which this Court should not intervene unless, of course, it wants to become the arbiter of all administrative and managerial decisions relating to the new System.

Federal law does not require that a service delivery system remain static merely because consumers are fearful of change or will be unable to see the same provider. A similar complaint was rejected in *Cerpac v. Health and Hospitals Corp.,* 147 F.3d 165, 168 (2nd Cir. 1998). In that case, parents of developmentally disabled children challenged the closing of a specialized facility where the bulk of services provided at the closed facility were to be provided at a new location which was one mile away.

That is precisely what is happening under the Hybrid Plan. The County is providing services at a different location and by a different provider. Its Hybrid Plan enables meaningful access to services that were previously provided by the RSTs. Are its service providers identical? No. Do they provide the same range and menu of services? Yes. As the *Cerpac* court stated, citing *Alexander v. Choate* 469 U.S. 387 (1985), the disability statutes neither guarantee any particular level of medical care for disabled persons, nor assure maintenance of services previously provided. To the contrary, there must be sufficient leeway for the public entity to "maintain a range of services and to administer services with an even hand." *Olmstead v. Zimring, supra,* 527 US at 605.

That is what the County is doing under the Hybrid Plan. This Court should decline to second guess what would be the most effective system. It should defer to the judgment of those with the requisite knowledge and expertise to design a mental health system of care.

B. Plaintiffs Have Not Established That They Are Likely To Succeed On The Merits Of Their Medicaid Claims.

Relying upon the Supremacy Clause, Plaintiffs assert that they have standing to challenge specified alleged violations of the Medicaid statues and regulations.[22] The issue of standing is not so easily dismissed as the afterthought that Plaintiffs seem to give it. Even assuming that the Court finds that there is a "case in controversy," Plaintiffs still must establish that the specific statutes and regulations upon which their claims are based confer standing. No such private right of action exists.

No private right of action exists to enforce the Medicaid provision that requires the state plan to include reasonable standards, i.e. Plaintiffs' Fifth Claim for Relief. *Watson v. Weeks,* 436 F.3d 1152 (9th Cir. 2006). Similarly, to the extent Plaintiffs Third and Fourth Claims for Relief are premised upon Medicaid regulations, those regulations do not independently create enforcement rights. See e.g. *Save Our Valley v. Sound Transit*, 335 F.3d 932 (9th Cir. 2003).

Plaintiffs assert that by virtue of the ruling in *Independent Living Center of Southern California, Inc. v. Shewry*, 543 F.3d 1050 (9th Cir. 2008), all Medicaid provisions are enforceable directly under the Supremacy Clause.[23] However, Plaintiffs are wrong. *Independent Living* stands for the proposition that an individual has a private right of action to challenge "state legislation" that is preempted by federal law. *Id* at 1065. The state defendant in *Independent Living* had passed legislation that directly impacted Medicaid payments to providers. *Id* at 1053.

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[22] Specifically Plaintiffs have alleged violations of 42 CFR §§440.230(b), 440.240(a), (b)(1) and 42 USC §§ 1396a(a)(10)(B) and (a)(17).

[23] *Independent Living* was wrongly decided because it conflicts with numerous precedents set by the Supreme Court, including *Gonzaga v. Doe*, 536 U.S. 273 (2002), and because the Supremacy Clause does not in and of itself create any substantive right. See *Dennis v. Higgins* 498 U.S. 439, 450 (1991): *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989); *Chapman v. Houston Welfare rights Org*, 441 U.S. 600, 615 (1979). The County realizes that this Court cannot overrule the Ninth Circuit's decision in *Independent Living*, however, the County raises this issue to preserve it if later appellate proceedings are necessary.

However, the case at bar is not a preemption case, so any standing under the Supremacy Clause is inapposite. Plaintiffs do not point to any state or local law that conflicts with any of those provisions and which should be preempted. To the contrary, Plaintiffs seek to directly enforce substantive rights under the Medicaid statutes and regulations.

The County has not enacted legislation potentially conflicting with Medicaid/Medi-Cal statutes. It has simply changed its service delivery mode. Neither the types of services provided, nor the population served has been altered. A change in service providers does not trigger preemption under the Supremacy Clause.

Assuming *arguendo* that Plaintiffs do have a private cause of action, they have still failed to demonstrate a likelihood of success on the merits of their Medicaid claims. They have not provided any evidence that the Hybrid Plan will be insufficient "in amount, duration or scope to achieve [the Medicaid Act's] purpose." 42 C.F.R. §440.230(b).

The Medicaid statutes and regulations do not dictate any particular level of service that is sufficient in "amount, duration and scope" to meet the purposes of the Medicaid program. The Medicaid Act gives substantial discretion to choose the proper mix of benefits, as long as care and services are provided in the best interests of recipients. *Alexander v. Choate, supra,* 469 U.S. 287; see also *Parry By and Through Parry v. Crawford*, 990 F.Supp. 1250, 1257 (D. Nev. 1998). To hold otherwise would mean that coverage is unlimited. Budgeting would be by blank check.

Under the Hybrid Plan, the County will continue to offer the same menu and level of services that were provided in the prior year by the RSTs. (Zykofsky Decl.) It will continue to provide the same level that is required in the County's MHP contract and the same level that is documented in consumers' care plans. (Zykofsky Decl.) Moreover, those services will now be provided with trained clinical staff supported by contractor psychiatrists and peers. What was legally adequate in 2009-10 does not become legally inadequate in 2010-11 merely by changing locations or services providers.

Plaintiffs have not submitted any evidence demonstrating that services provided under the Hybrid Plan are less than, or not comparable to, those provided in other counties. All Plaintiffs give the Court is a baseless assertion that the County fails. They do so without a single declaration that details the provision of services in any of the other 57 counties in the state. The only evidence before the Court on this point is that submitted by Defendants. That evidence shows that the County is comparable with other counties and is, therefore, in compliance with federal statues and regulations. (Zykofsky Decl.)

Plaintiffs similarly fail on their last Medicaid claim, i.e. their claim that the County has not used any reasonable standard to make the redesign. Again, they are wrong. It is undeniable that the impetus for the redesign was the unprecedented budget shortfall with which the County was faced this year, including the decrease in realignment funds that were historically used to fund the RSTs. (Bennett Decl.) The County devised this redesign to accommodate the need to use realignment resources in other capacities. (Bennett Decl.) As noted above, this redesign accomplishes these goals without sacrificing service to any of the mental health consumers. Therefore, the County is in compliance with 42 U.S.C. §1396a(a)(17) because the County has utilized "reasonable standards" to make this change.

C. The County Has Not Violated Plaintiffs' Due Process Rights

Plaintiffs lay out the case law regarding due process and Medicaid benefits. What they fail to explain, or provide evidence of, is how the County has violated that body of law. Plaintiffs' assertion that the system redesign will necessarily lead to reductions and elimination of services is supported only by speculation. The facts are that the County is providing the same menu of services to consumers as under the contractor-operated system. (Weaver, Kennedy, Zykofsky Decls.)

The Hybrid Plan does not affect entitlement to levels of services or benefits that might otherwise trigger the due process requirements. There is no adverse action, no

reduction or modification of benefits or services to individual consumers. Therefore, due process notices of reduction are not triggered.

Certainly, consumers of County mental health services have a need to be notified of where they will be receiving services in the future. The County has, and will continue, to provide such notice. (Bennett Decl.) However, the mere fact that a provider or service location has been changed does not trigger Medicaid due process rights. Plaintiffs have provided no authority to contradict this position because no such authority exists.

VIII.

PLAINTIFFS HAVE FAILED TO ESTABLISH A THREAT OF IRREPARABLE INJURY

Plaintiffs assert they will be denied medically necessary, outpatient mental health services. However, such assertions are based upon mere conjecture as to hypothetical injuries that might possibly occur under a proposal that was never finalized, recommended, submitted or adopted. Plaintiffs do not address how the Hybrid Plan denies them outpatient services.

A preliminary injunction may only be granted when the moving party has demonstrated a significant threat of irreparable injury. *Simula, Inc. v. Autoliv, Inc.,* 175 F.3d 716, 725 (9th Cir. 1999). Even if Plaintiffs establish a likelihood of success on the merits, the absence of a substantial likelihood of irreparable injury, standing alone, makes preliminary injunctive relief improper. *Siegel v. Lepore,* 234 F.3d 1163, 1176 (11th Cir. 2000); *Watkins, Inc. v. Lewis,* 346 F.3d 841, 844 (8th Cir. 2003). Abstract or hypothetical injury is not enough; Plaintiffs mush show that they "[have] sustained or [are] immediately in danger of sustaining some direct injury." *City of Los Angeles v. Lyons,* 461 U.S. 95, 101-102 (1983).

Plaintiffs have filed numerous declarations, the majority of which assert the fears

and concerns of mental health consumers relating to an unadopted proposed redesign.[24] All of those declarations make conclusory statements that Plaintiffs will be denied necessary services. However, fear of change, without more, does not constitute a showing of irreparable injury. See e.g. *Putz v. Schwarzenegger* 2010 WL 1838717 (N.D.Cal. 2010).

Plaintiffs also rely on the declaration of "experts" who base their opinions on erroneous and factually inaccurate information. For example, Plaintiffs' expert (Dr. Michael Franczak) concludes that irreparable harm will occur "without providing adequate replacement services and transition to those services." (Franczak Decl., Para. 10.) This conclusion is erroneously based on an assumption that the County's System cuts off funding to the RSTs and the TCORE program entirely, that new County-operated clinics will open on July 1, 2010, and that the transition will be complete by October 1, 2010. (Franczak Decl., Para. 9.) No part of his declaration is apparently based on the Hybrid Plan. In fact, he fails to render any opinion at all on the Hybrid Plan. His conclusions are not grounded in the reality of the situation. Accordingly, his conclusions regarding the harm that Plaintiffs will experience are conjecture and hypothetical – bases which cannot establish the requisite irreparable injury.

Based on the realities of the Hybrid Plan, rather than the hypothetical proposal alleged in the Complaint, Plaintiffs do not face any real or immediate harm by the Hybrid Plan's implementation. As such, Plaintiffs' Motion should be denied for failure to establish any harm other than abstract injury.

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[24] Only four of the declarations were submitted following adoption of the Hybrid Plan. As stated in the Defendants' Evidentiary Objections, all suffer from serious deficiencies. Of the four, only Stoneking's declaration purports to express an "expert" opinion. However, that declaration merely disputes the characterization of the service modality of the Hybrid Model (recovery versus clinical), the propriety of the staffing composition between clinical staff and peers, and the basis for appropriate budgeting for the RSTs during the transition period. These are all operational issues. Nothing in the ADA or Medicaid statutes and regulations require that services be provided under any particular type of treatment modality or with any particular staffing composition. The method chosen to reimburse contractors is also a purely administrative determination.

IX.

THE BALANCE OF HARDSHIPS FAVORS THE COUNTY AND THE PUBLIC INTEREST IS BEST SERVED BY DENYING THE MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs argue that the hardships endured by them are greater than any hardship experienced by the County if the contractor-operated model were reinstated. This claim ignores the fact that services provided to Plaintiffs are not being reduced or eliminated. The reality is that the only "harm" that Plaintiffs will suffer is the continued receipt of services at a different location by a different provider. In stark contrast, reinstatement of the contractor-operated model will result in substantial hardship to other constituent populations of the County. The County will have to reduce other programs or services in order to fund the RSTs, thereby resulting in reductions to other vital and mandated programs and services. (Burkart Decl.)

Mental health services are only one of many programs that the County must provide. Other programs include medical services to the medically indigent, law enforcement services, supervision of probationers, child protective services, adult and dependent adult abuse services, coroner services, park services to the American River Parkway and aid payments to welfare recipients.

An injunction that prohibits the County from implementing the Hybrid Plan triggers a domino effect. It would require the County to fund RSTs at the expense of other vital services. (Burkart Decl.) Reductions to any of those programs negatively impact core services that are provided to County residents as a whole, leaving the widespread impact of those cuts to affect all the residents of the County. It is not County government that would be adversely impacted, but the recipients of governmental services.

What Plaintiffs essentially ask this Court to do is to interfere with the reasoned judgment of the Board of Supervisors. However, the budgetary process entails a complex balancing of public needs in many and varied areas with finite financial resources

available for distribution among those demands. It involves interdependent political, social, and economic judgments which cannot be examined in a vacuum without considering the potential impact to other services the County provides.

Under the "separation of powers" principle, a court generally should not interfere in the budgetary process. *County of Butte v. Superior Court of Butte County,* 176 Cal.App.3d 693, 698 (1985). Courts have long held that "legislative bodies have broad scope to experiment with economic problems" and absent decisions running afoul of constitutional prohibitions or law, may manage their economic resources as they deem appropriate. *Ferguson v. Skrupa,* 372 U.S. 726, 729-730 (1962).

To maintain the RST model and funding as it has traditionally operated would create undue hardship on the County. Such hardship which will impact every County resident outweighs the fears of Plaintiffs as they transition from the RSTs to the Wellness Centers.

X.

CONCLUSION

For all the reasons previously stated, Plaintiffs' Motion for Preliminary Injunction should be denied in its entirety.

DATED:July 7, 2010

ROBERT A. RYAN, JR., County Counsel
Sacramento County, California

By: _____
MICHELE BACH
Supervising Deputy

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