

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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9	LYDIA DOMINGUEZ, et al.,	No. C 09-02306 CW
10	Plaintiffs,	ORDER GRANTING
11	v.	PLAINTIFFS'
12	ARNOLD SCHWARZENEGGER, et al.,	APPLICATION FOR A
13	Defendants.	TEMPORARY
14	_____ /	RESTRAINING ORDER
15		AND ORDER TO SHOW
16		CAUSE WHY
17		PRELIMINARY
18		INJUNCTION SHOULD
19		NOT ISSUE

20 Plaintiffs apply for a temporary restraining order and order
21 to show cause why a preliminary injunction should not issue to
22 prohibit Defendants from implementing an In Home Supportive
23 Services (IHSS) rate reduction in Fresno County from \$10.25 to
24 \$8.00 in hourly wages, and from \$0.85 to \$0.60 in hourly benefit
25 contributions. State Defendants and Fresno County Defendants both
26 oppose Plaintiffs' application for a temporary restraining order
27 and order to show cause. The matter was heard on June 29, 2010.
28 Having considered all of the parties' papers and oral argument on
the motions, the Court concludes that Plaintiffs have established a
likelihood of success on their claim that State Defendants have
violated the procedural requirements of the Medicaid Act. The
Court also concludes that Plaintiffs will suffer irreparable injury

1 in the absence of temporary relief. The balance of equities is in
2 Plaintiffs' favor and a temporary restraining order is in the
3 public interest. Accordingly, the Court grants Plaintiffs'
4 application for a temporary restraining order and orders Defendants
5 to show cause why a preliminary injunction should not issue.

6 BACKGROUND

7 Over thirty years ago, California established the IHSS program
8 to provide assistance with the tasks of daily living to low-income
9 elderly and disabled persons "who cannot safely remain in their
10 homes or abodes of their own choosing unless these services are
11 provided." Cal. Welf. & Inst. Code § 12300(a). IHSS providers
12 give services such as assistance with bathing, dressing, cooking,
13 feeding, bowel and bladder care, self-administration of medication
14 and cleaning. Id. § 12300(b), (c). Over 360,000 IHSS providers
15 serve over 440,000 individuals in California. As of May 31, 2010,
16 10,116 IHSS providers serve 12,028 individuals in Fresno. Katz
17 Decl., Ex. 1. Seventy-two percent of providers in Fresno are
18 family members of IHSS recipients. Id.

19 IHSS is administered by the State's counties. Fifty-six of
20 California's fifty-eight counties have established either a public
21 authority (PA) or a non-profit consortium (NPC) to deliver IHSS
22 services. Each of these fifty-six counties has created and
23 maintains a registry from which service providers can be drawn. As
24 of June 1, 2010, there were 361 persons in the Fresno registry, who
25 are currently seeking employment as an IHSS provider. Katz Decl.
26 ¶ 4. These PAs and NPCs are considered employers of IHSS providers
27 for some purposes, including collective bargaining agreements
28 pertaining to providers' wages and benefits; however, individual

1 consumers hire, fire and supervise their own IHSS providers. Id.
2 § 12301.6(c)(1).

3 Each county establishes the providers' wages and benefits.
4 Thus, the rates paid to IHSS providers vary by county. Because
5 most IHSS consumers participate in California's Medicaid program,
6 the federal government pays for about sixty-two percent of the IHSS
7 program's costs.¹ See 42 U.S.C. § 1396d(b). The State pays sixty-
8 five percent and the county pays thirty-five percent of the
9 remaining thirty-eight percent of the program's costs. Cal. Welf.
10 & Inst. Code § 12306. The State's contribution, however, is
11 subject to a statutory cap. Currently, the maximum state
12 contribution is sixty-five percent of the non-federal share of a
13 wage and benefit package of \$12.10 per hour. Id. at § 12306.1(c)-
14 (d).

15 Wages and benefits are determined through the collective
16 bargaining process at the county level. Once these wages and
17 benefits are decided, they must be submitted to the California
18 Department of Health Care Services to ensure that they comply with
19 all applicable state and federal laws. Id. § 12306.1(a)-(b).

20 In response to California's unprecedented budget crisis, on
21 February 20, 2009, the Governor signed into law California Welfare
22 and Institutions Code § 12306.1(d)(6). Scheduled to take effect
23 July 1, 2009, the law would have reduced the State's maximum
24 contribution in wages and benefits from sixty-five percent of the
25 non-federal share of an hourly rate of \$12.10 to sixty-five percent

26
27 ¹Before the passage of the American Recovery and Reinvestment
28 Act of 2009, the federal government contributed fifty percent of
the program's costs. Dominguez v. Schwarzenegger, 595 F.3d 1087,
1091 n.2 (9th Cir. 2010).

1 of the non-federal share of an hourly rate of \$10.10.

2 On June 4, 2009, Plaintiffs filed this class action complaint
3 and moved for entry of a preliminary injunction prohibiting State
4 Defendants from implementing section 12306.1(d)(6) pending a final
5 decision on the merits. On June 26, 2009, the Court granted
6 Plaintiffs' motion and found that they had demonstrated a strong
7 likelihood of success on their first cause of action, that State
8 Defendants had violated the federal Medicaid Act by failing to
9 consider the factors set forth in 42 U.S.C. § 1396a(a)(30)(A)
10 (Section 30(A)) before enacting section 12306.1(d)(6). The Court
11 also concluded that, absent immediate injunctive relief, both IHSS
12 consumers and providers would suffer irreparable harm as a result
13 of the wage reductions caused by the implementation of section
14 12306.1(d)(6).

15 Thereafter, Fresno County proceeded to reduce IHSS provider
16 wages for reasons other than section 12306.1(d)(6). Plaintiffs'
17 instant application for a temporary restraining order concerns this
18 attempted reduction.

19 The memorandum of understanding which set Fresno's IHSS
20 providers' wages and benefits at a combined rate of \$11.10 expired
21 on September 30, 2009. After months of negotiations between the
22 Fresno IHSS PA and the Service Employees International Union,
23 California State Council (SEIU), the parties reached an impasse.
24 In mid-April, 2010, Fresno informed the union that it intended to
25 reduce IHSS wages to \$8.00 per hour (the state minimum wage, Cal.
26 Labor Code § 1182.12) and benefits to \$0.60 per hour, effective
27 July 1, 2010. On May, 25, 2010, the Fresno County Board of
28 Supervisors approved the rate reduction. The following day, Fresno

1 submitted its rate change request to the California Department of
2 Social Services and the Department of Health Care Services for
3 approval. On June 24, the State approved Fresno's rate decrease.
4 Romero Decl., Ex. E.² The State admits that it did not perform any
5 study assessing the impact of the rate reduction on IHSS consumers
6 or providers before approving the rate request.

7 Plaintiffs claim that the twenty percent rate reduction will
8 severely affect IHSS providers. Many IHSS providers will have to
9 seek other employment, and many of those that remain in their job
10 will no longer be able to pay for basic needs such as food, health
11 care and housing. Howes Decl. ¶ 88; Aguilar Decl. ¶ 4; Bailey
12 Decl. ¶ 6; Boushele Decl. ¶ 6; M. Garcia Decl. ¶ 5; Jones Decl.
13 ¶ 65; Moreno Decl. ¶ 7; Thao Decl. ¶ 9; Muniz Decl. ¶ 4; Ward Decl.
14 ¶¶ 4-5; Wright Decl. ¶ 5; Maiden Decl. ¶ 4; Singh Decl. ¶ 4. Many
15 of these providers are family members of IHSS consumers and are
16 responsible for providing housing, food, medication, and other
17 necessities for their elderly or disabled relative. Plaintiffs
18 assert, therefore, that both the providers and IHSS consumers are
19 likely to suffer serious deprivations. Brown Supp. Decl. ¶ 9;
20 Cendejas Decl. ¶ 4; Everhardt Decl. ¶ 4; Leon Decl. ¶ 5; Martinez
21 Decl. ¶ 6; Perez Decl. ¶ 5; Valdez Decl. ¶ 4.

22 Plaintiffs also claim that the rate reduction will force many
23 IHSS consumers into difficult, if not untenable, positions. The
24 IHSS consumers who lose their providers will either have to find
25 another provider, attempt to live in their homes without IHSS

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27 ²Plaintiffs object to the Declaration of Rolonda Moen
28 submitted in support of State Defendants. The objection is
overruled as moot because the Court did not rely on any aspect of
the declaration to which Plaintiffs objected.

1 services or enter institutional care. The individuals who can find
2 new providers at the lower wage will be harmed by the loss of
3 continuity of care and disruption of relationships that often take
4 months or years to build. Lee Decl. ¶ 5; Hanlon Decl. ¶ 6; Hopkins
5 Decl. ¶ 6; Moore Decl. ¶ 6; Steward Decl. ¶ 7. Even before the
6 rate reduction, IHSS recipients have reported extreme difficulty in
7 finding adequate providers. For example, at least one recipient
8 spent weeks in a nursing home until she could secure a provider.
9 See eg., Hopkins Decl. ¶ 6.

10 Plaintiffs also assert that some consumers will be forced to
11 enter nursing facilities or other residential institutions because
12 of their inability to remain in their homes without the help of
13 IHSS providers. Howes Decl. ¶¶ 4, 76-84; Buckley Decl. ¶ 6; Jones
14 Decl. ¶ 8; R. Garcia Decl. ¶ 5; Hopkins Decl. ¶¶ 6-7; Moreno Decl.
15 ¶ 8; Bailey Decl. ¶ 8; Miller Supp. Decl. ¶ 6; Moore Decl. ¶ 6;
16 Gilchrist Decl. ¶ 6; Schnelle Decl. (Dkt. 45) ¶ 5; Altman Decl.
17 (Dckt. 6) ¶ 6. Plaintiffs claim that the consequences of
18 institutionalization, which include loss of independence and
19 reduced quality of care, would be devastating for individuals who
20 are currently able to live moderately independent lives in their
21 homes. Miller Supp. Decl. ¶ 5; Wilkins Supp. Decl. ¶ 6; R. Garcia
22 Decl. ¶ 5; Gilchrist Decl. ¶ 7; Hanlon Decl. ¶ 7; Hopkins Decl.
23 ¶ 7; Vang Decl. ¶ 7; Lee Decl. ¶ 7; Moore Decl. ¶ 7.

24 Lastly, Plaintiffs assert that the wage decrease will also
25 cause the State to incur millions of dollars in increased
26 institutionalization costs, as well as to lose significant tax
27 revenues and incur other Medi-Cal expenses. Howes Decl. ¶¶ 9-10;
28 88-89 & nn.2-3; see also LaPlante Decl. (Dkt. 28) ¶ 8; Altman Decl.

(Dkt. 6) ¶ 6.

Fresno County states that it is in dire financial straights and that it cannot afford to continue to pay IHSS providers wages and benefits of \$11.10 per hour. Over the last four years, the County has cut 1,504 positions, in addition to a projection of an addition 369 layoffs for the 2010-2011 fiscal year. Kovacevic Decl. ¶ 11. Fresno claims that, to maintain the current IHSS wages, it would be forced to operate at a deficit each month in the amount of \$435,455, which equals \$5,225,455 for the year.

Id. ¶ 12.

LEGAL STANDARD

"The standard for issuance of a temporary restraining order is the same as that for issuance of a preliminary injunction." Burgess v. Forbes, 2009 WL 416843, at *2 (N.D. Cal.). To obtain a preliminary injunction, the moving party must "establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Natural Res. Def. Council, Inc., ___ U.S. ___, 129 S. Ct. 365, 374 (2008).

DISCUSSION

I. Likelihood of Success on the Merits

To receive federal financial participation in payment for services that states provide to low income persons who are aged, blind, disabled or members of families with dependent children, states must agree to comply with applicable federal Medicaid law. Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1493 (9th Cir. 1997). The Medicaid Act requires a participating state to develop a state

1 plan which describes the policy and methods to be used to set
2 payment rates for each type of service included in the program. 42
3 C.F.R. § 447.201(b). A provision of the Medicaid Act, 42 U.S.C.
4 § 1396a(a)(30)(A) (hereinafter Section 30(A)), requires, in
5 relevant part, that a state's Medicaid plan:

6 provide such methods and procedures relating to the
7 utilization of, and the payment for, care and services
8 available under the plan . . . as may be necessary . . . to
9 assure that payments are consistent with efficiency, economy,
10 and quality of care and are sufficient to enlist enough
11 providers so that care and services are available under the
12 plan at least to the extent that such care and services are
13 available to the general population in the geographic area.

14 The Ninth Circuit has noted that "providers' wages and benefits
15 . . . are directly correlated to ensuring that services are
16 consistent with efficiency, economy, and quality of care, and
17 sufficient to ensure access to services under the IHSS program."
18 Dominguez, 596 F.3d at 1093; see also Orthopaedic Hosp. v. Belshe,
19 103 F.3d 1491, 1493 (9th Cir. 1997) ("payments for [Medi-Cal]
20 services must be consistent with efficiency, economy, and quality
21 of care, and . . . those payments must be sufficient to enlist
22 enough providers to provide access to Medicaid recipients.").

23 Because State Defendants' approval of the Fresno rate
24 reduction "directly affects what Medi-Cal providers are paid for
25 providing services," Dominguez, 596 F.3d at 1093 (emphasis in
26 original), this action requires compliance with Section 30(A). Id.
27 at 1094 ("The Department [of Social Services] is thus well aware
28 that prior to approving reimbursement rates established through
collective bargaining, it must determine whether sufficient access

1 to services is available.").³ Thus, State Defendants' approval of
2 the Fresno County rate change request cannot be valid unless State
3 Defendants "actually considered" an analysis regarding the impact
4 of the requested change on access and quality of care, prior to
5 approving the request. California Pharmacists Ass'n v. Maxwell-
6 Jolly, 563 F.3d 847, 850 (9th Cir. 2009).

7 The State cannot abdicate this responsibility by relying on
8 the fact that, through collective bargaining, the counties
9 determine IHSS wages and benefits. Martinez v. Schwarzenegger,
10 2009 WL 1844989, at *5 (N.D. Cal.) ("a county's role in determining
11 IHSS wages and benefits does not preclude the State from analyzing
12 the impact of [a rate reduction] on the Section 30(A) factors prior
13 to enactment"). Under the Medicaid Act, the State, not the
14 individual counties, is bound by Section 30(A) as a condition of
15 Medicaid participation to ensure that rates are consistent with

16
17 ³Fresno Defendants argue that this portion of Dominguez is
18 dicta because the primary issue before the court was whether the
19 State violated Section 30(A) when enacting California Welfare &
20 Institutions Code § 12306.1(d)(6) without conducting a Section
21 30(A) analysis. The Ninth Circuit has noted that "'where a panel
22 confronts an issue germane to the eventual resolution of the case,
23 and resolves it after reasoned consideration in a published
24 opinion, that ruling becomes the law of the circuit, regardless of
25 whether doing so is necessary in some strict logical sense.'" Cetacean Cmty. v. Bush, 386 F.3d 1169, 1173 (quoting United States
26 v. Johnson, 256 F.3d 895, 914 (9th Cir. 2001) (Kozinski, J.,
27 concurring)). This is true "regardless of whether it was in some
28 technical sense 'necessary' to [the court's] disposition of the
case," so long as the issue was "addressed . . . and decided . . .
in an opinion joined in relevant part by a majority of the panel."
Barapind v. Enomoto, 400 F.3d 744, 750-51 (9th Cir. 2005) (en
banc). Here, even if the quoted portions of Dominguez were not
"germane" to the resolution of case, the Court finds them
persuasive. The Ninth Circuit was directly responding to State
Defendants' argument that Section 30(A) did not apply to it because
counties controlled rate setting. The court held that the State
must ensure compliance with Section 30(A) when approving counties'
proposed rates because of the integral role and oversight the State
plays by approving those rate changes.

1 quality care and are sufficient to enlist enough providers so that
2 care and services are available. See 42 C.F.R. § 431.10 (requiring
3 that single state agency be responsible for administration of
4 State's Medicaid program).

5 Here, the State does not put forth any evidence that it
6 considered the Section 30(A) factors before approving the rate
7 change request submitted by Fresno. Accordingly, the Court
8 concludes that Plaintiffs have made a strong showing of likelihood
9 of success on the merits that Defendants violated the procedural
10 requirements of Section 30(A).

11 Because the Court concludes that a temporary restraining order
12 is warranted based on Plaintiffs' likelihood of success on their
13 procedural claim, the Court need not determine the likelihood of
14 Plaintiffs' success on their claim that Defendants violated the
15 substantive requirements of Section 30(A) or their claim that
16 Defendants violated the Americans with Disabilities Act.

17 II. Irreparable Harm, Balance of Hardships and the Public Interest

18 IHSS consumers will suffer immediate and irreparable harm
19 unless the Court issues a temporary restraining order. As the
20 Court previously recognized when it enjoined section 12306.1(d)(6):

21 The wage reductions will cause many IHSS providers to leave
22 employment, which in turn will leave consumers without IHSS
23 assistance. The consumers' quality of life and health-care
24 will be greatly diminished, which will likely cause great
25 harm to disabled individuals. For instance, the
26 declarations submitted by Plaintiffs describe harms ranging
27 from going hungry and dehydration, to falls and burns, to an
inability ever to leave the home. Institutionalizing
individuals that can comfortably survive in their home with
the help of IHSS providers will "cause Plaintiffs to suffer
injury to their mental and physical health, including a
shortened life, and even death for some Plaintiffs."
Crabtree v. Goetz, 2008 WL 5330506, at *30 (M.D. Tenn.).

28 Prelim. Inj. Order (Dkt. 131) at 10:26-11:10.

1 Similarly, the wage reductions at issue here are likely to
2 cause many providers to reduce their hours or quit IHSS employment
3 entirely. Howes Decl. ¶¶ 71-75; Aguilar Decl. ¶ 4; Bailey Decl.
4 ¶ 6; Boushele Decl. ¶ 6; M. Garcia Decl. ¶ 5; Jones Decl. ¶ 6;
5 Moreno Decl. ¶ 7; Thao Decl. ¶ 9; Muniz Decl. ¶ 4; Ward Decl. ¶ 5;
6 Wright Decl. ¶ 5; Altman Decl. (Dkt. 6) ¶ 4. This will likely
7 force IHSS recipients to go without IHSS assistance for some period
8 of time, or worse, enter a nursing home or other institutional
9 facility. The quality of these consumers' lives and health care
10 will be greatly diminished, causing them irreparable harm.

11 IHSS providers will also suffer immediate and irreparable
12 harm. Although financial injury is generally not adequate to
13 establish irreparable harm, L.A. Mem'l Coliseum Comm'n v. Nat'l
14 Football League, 643 F.2d 1197, 1202 (9th Cir. 1980), financial
15 harm to the IHSS providers is irreparable because retrospective
16 monetary damages are unavailable due to the State Defendants'
17 Eleventh Amendment immunity. California Pharmacists, 563 F.3d at
18 851-52 ("[B]ecause the Hospital Plaintiffs and their members will
19 be unable to recover damages against the Department even if they
20 are successful on the merits of their case, they will suffer
21 irreparable harm if the requested injunction is not granted.").
22 Further, the planned wage reduction "would impact many providers'
23 ability to afford such basic necessities as food, clothing,
24 utilities, and rent." Dominguez, 596 F.3d at 1098; see also Bailey
25 Decl. ¶ 6, Boushele Decl. ¶ 6; Maiden Decl. ¶ 4; Singh Decl. ¶ 4;
26 Ward Decl. ¶ 4; Brown Supp. Decl. ¶ 9; Cendejas Decl. ¶ 4;
27 Everhardt Decl. ¶ 4; Leon Decl. ¶ 5; Martinez Decl. ¶ 6; Perez
28 Decl. ¶ 5; Valdez Decl. ¶ 4.

1 The balance of hardships and the public interest also weigh in
2 Plaintiffs' favor. If the temporary restraining order does not
3 issue, the State and Fresno Defendants' sole injury will be the
4 financial costs associated with continuing to participate under the
5 current IHSS provider wages. The Court notes that there is
6 persuasive evidence that the wage cuts would actually cost the
7 State and Fresno County tens of millions of additional dollars
8 because in-home care is considerably less expensive than
9 institutional care and IHHS providers reduce the need for expensive
10 emergency room visits. Accordingly, the financial loss the State
11 and Fresno County will suffer if the wage reduction is not
12 implemented does not outweigh the hardship Plaintiffs would suffer
13 absent a temporary restraining order. Lastly, the public interest
14 weighs heavily in favor of granting relief. "It would be tragic,
15 not only from the standpoint of the individuals involved but also
16 from the standpoint of society, were poor, elderly, disabled people
17 to be wrongfully deprived of essential benefits for any period of
18 time." Lopez v. Heckler, 713 F.2d 1432, 1437 (9th Cir. 1983).

19 III. Bond

20 Federal Rule of Civil Procedure 65(c) "invests the district
21 court 'with discretion as to the amount of security required, if
22 any.'" Jorgensen v. Cassiday, 320 F.3d 906, 919 (9th Cir. 2003)
23 (emphasis in original; quoting Barahona-Gomez v. Reno, 167 F.3d
24 1228, 1237 (9th Cir. 1999)). A district court has the discretion
25 to dispense with the security requirement where giving security
26 would effectively deny access to judicial review. See Save Our
27 Sonoran, Inc. v. Flowers, 408 F.3d 1113, 1126 (9th Cir. 2005)
28 (citation omitted). Similarly, a district court may waive the bond

1 requirement where the plaintiffs are indigent. See Walker v.
2 Pierce, 665 F. Supp. 831, 844 (N.D. Cal. 1987). The Court waives
3 the bond requirement for Plaintiffs because many of them are
4 indigent and to ensure their ability to access the courts on behalf
5 of themselves and other class members.

6 CONCLUSION

7 For the foregoing reasons, the Court grants Plaintiffs'
8 application for a temporary restraining order and order to show
9 cause why a preliminary injunction should not issue. Docket No.
10 287. As set forth in the separately filed temporary restraining
11 order, Defendants are enjoined and restrained from implementing
12 Fresno's wage and benefits reductions. The Court also grants
13 Plaintiffs' motion to exceed the page limit for their reply.
14 Docket No. 355.

15
16 IT IS SO ORDERED.

17 Dated: 07/02/10



18 CLAUDIA WILKEN
19 United States District Judge
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