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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JERRY THOMAS, by and through his *guardian ad litem* BEVERLY THOMAS, , SEAN BENISON, JUAN PALOMARES and IN SPIRIT

Plaintiffs,

v.

JENNIFER KENT, Director of the Department of Health Care Services, State of California DEPARTMENT OF HEALTH CARE SERVICES,

Defendants.

CASE NO. 14-CV-08013-FMO (AGRx)

SECOND AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Courtroom: 22, 5th Floor
Judge: Hon. Fernando M. Olguin
Action Filed: 10/25/2014
Trial Date: 04/26/2016

I. INTRODUCTION

1. This civil rights action seeks declaratory and injunctive relief to stop Defendants Department of Health Care Services and its Director, Jennifer Kent ("DHCS" or "Defendants") from continuing their illegal practices which result in denial of critically needed Medi-Cal funded in-home services to individuals such as Plaintiffs Jerry Thomas, Sean Benison, and Juan Palomares, and the clients of organizational Plaintiff IN SPIRIT. Failure to receive these services will result in severe harm and potential institutionalization of these individuals with disabilities. Due to their fragile medical conditions, placement in an institution is likely to result in dire health consequences and even death. Institutional care for Plaintiffs would also cost the State significantly more than it would to keep them safely in their own homes.

2. Individual Plaintiffs have severe disabilities and chronic medical conditions: Plaintiff Jerry Thomas is diagnosed with Progressive Supranuclear Palsy and Post-Polio Syndrome. Plaintiff Sean Benison has advanced hereditary progressive Muscular Dystrophy. Plaintiff Juan Palomares has a complete spinal cord injury at the 4th vertebrae in the cervical area (C-4); the spinal cord injury also caused autonomic dysreflexia, which is instability in his nervous system that can cause unpredictable and potentially life-threatening blood pressure changes. Due to their health conditions, Plaintiffs are quadriplegic and cannot move on their own. Plaintiffs Thomas and Benison have tracheal tubes connected to ventilators to help them breathe. Plaintiff Thomas receives nutrition and hydration via a Gastrostomy feeding tube.

3. Although Plaintiffs meet the criteria for placement in nursing institutions, Plaintiffs have been able to remain in their communities and close to their families because of in-home care available to them in their homes under the Medi-Cal Home and Community-Based Services Nursing Facility/Acute Hospital Waiver ("NF/AH Waiver"), administered by Defendants.

4. All three Plaintiffs live in their own homes, with round-the-clock care provided by licensed nurses, and unlicensed paid and/or unpaid attendants. However, Plaintiffs also have unmet care needs. Pursuant to their doctors' orders, Plaintiff Thomas needs 24 hour nursing care, and Plaintiff Benison needs additional nursing care, to assess and address their complex and unpredictable needs, including monitoring their ventilators and oxygen levels, preparing and administering medications, and clearing fluids from their lungs and tracheotomy tubes. Plaintiff Palomares needs, among other things, nursing care to manage his complicated catheter care, and monitor and assess his unstable and unpredictable health conditions; additional attendant hours so that he can be repositioned and cared for more frequently to prevent health crises; and reinstatement of RN case management. Plaintiff Benison, who lives alone, also requires Case Management and Habilitation services, which are available under the NF/AH Waiver.

5. Plaintiffs have all requested additional in-home care services from Defendants, so that they can continue living safely in their homes and communities. Defendants have denied these requests. The sole reason Plaintiffs are not able to get these critically needed services is because Defendants have placed arbitrary cost limitations on services available under the NF/AH Waiver.

6. For Waiver participants like Plaintiffs Thomas and Benison, who have been determined to meet the Subacute level of care, Medi-Cal would pay $271,697 per year for institutional placement in a Subacute facility; however, Defendants have capped the budget for comparable in-home services funded through the NF/AH Waiver at $180,219 per year, which is at least $90,000 below the actual cost of equivalent care in a Subacute facility. The cost of the additional nursing and other NF/AH Waiver services requested by Plaintiffs Thomas and Benison would cost less than placement in a Subacute facility.

7. Similarly, for Waiver participants like Plaintiff Palomares, who have been determined to meet the Nursing Facility Level B ("NF-B") Level of Care,

Medi-Cal would pay approximately $70,000 per year for institutional placement in a Nursing Facility; however, Defendants have capped the budget for in-home services funded through the NF/AH Waiver at $48,180.00 per year, which is more than $21,000 below the actual cost of equivalent care in a Nursing Facility. The cost of the additional nursing and other NF/AH Waiver services requested by Plaintiff Palomares would cost less than placement in a Nursing Facility.

8. The NF/AH Waiver cost-caps at all levels of care are significantly below the rate Medi-Cal pays to institutions at the equivalent level of care.

9. Defendants have the discretion and the ability to modify the NF/AH Waiver to enable Plaintiffs to receive the skilled nursing care and other services they need to remain safely at home. But, they have refused to provide these essential services on the grounds that it exceeds their arbitrary cost-caps.

10. Defendants' actions violate the Americans with Disabilities Act of 1990 ("ADA"), (42 U.S.C. §§ 12101-12213 (2008)), Section 504 of the Rehabilitation Act of 1973 ("Section 504"), (29 U.S.C. §§ 794-794a (2014)), and California Government Code section 11135 (Cal. Gov't. Code § 11135 (2011)).

11. Under the ADA and Section 504, a public agency such as DHCS has a duty to provide services to people with disabilities in the "most integrated setting appropriate to their needs" and to prevent unnecessary institutionalization. The most integrated setting for the individual Plaintiffs and clients of IN SPIRIT is to continue living in their homes in the community, with adequate NF/AH Waiver services to meet their significant needs. Placing individuals with disabilities such as Plaintiffs at risk of unnecessary institutionalization in order to receive the care they need violates the ADA.

12. Under the ADA, Defendants also have an obligation to use methods of administration that do not discriminate against individuals with disabilities such as Plaintiffs. Defendants' failure to ensure that individuals with disabilities like Plaintiffs are provided with adequate NF/AH Waiver services to continue living

safely in their homes, and their decision to set funding levels for services that are biased in favor of institutional care results in discrimination against Plaintiffs in the administration of the Medi-Cal program.

II. JURISDICTION

13. This is an action for declaratory and injunctive relief for violations of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 (2008) and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2014).

14. Jurisdiction is based on 28 U.S.C. §§ 1331 (1980) and 1343 (1979). Plaintiffs' claims for declaratory and injunctive relief are authorized under 28 U.S.C. §§ 2201 (2010) and 2202 (1948). At all times relevant to this action, Defendants have acted under color of state law.

15. The Court has Supplemental Jurisdiction over Plaintiffs' state claim pursuant to 28 U.S.C. § 1367 (1990) and California Government Code section 11139 (2001).

III. VENUE

16. Venue is proper in the Central District of California pursuant to 28 U.S.C. § 1391(b) (2011), because the Defendants operate and perform their official duties therein and thus reside therein for purposes of venue, and because a substantial part of the events or omissions giving rise to the claims herein occurred in the Central District of California. Plaintiff Jerry Thomas lives and receives Medi-Cal services in Orange County, which is in the Central District of California. Plaintiff Juan Palomares lives and receives Medi-Cal services in Los Angeles County, which is in the Central District of California. Plaintiff Sean Benison lives and receives Medi-Cal services in Ventura County, which is in the Central District of California. Defendant DHCS operates the Medi-Cal program, conducts business and provides Medi-Cal services to Plaintiffs in Orange County, Los Angeles County and Ventura County, all in the Central District of California.

IV. PARTIES

Organizational Plaintiff

17. Organizational Plaintiff IN SPIRIT is a non-profit organization which provides financial aid to people with disabilities to help them pay for personal care attendants to enable them to live in their own homes. IN SPIRIT's mission is to empower individuals with disabilities to sustain their health, continue their participation in their families and communities, and avoid nursing facility placement. IN SPIRIT has been directly injured by Defendants' actions, which impede its ability to carry out its mission to assist people with disabilities in accessing community support services. IN SPIRIT has provided and currently provides financial assistance to individuals on the NF/AH Waiver, in order to supplement their limited at-home care services covered by the Waiver. Because of its commitment to provide financial support for attendant care for needy, high-level quadriplegics, IN SPIRIT will serve clients on the NF/AH Waiver in the future. IN SPIRIT has had to divert scarce resources from other potential clients to NF/AH Waiver recipients to pay for services that, but for the cost-caps, would be funded by the NF/AH waiver.

Individual Plaintiffs

18. Each individual Plaintiff is a "qualified person with a disability" within the meaning of all applicable statutes, including 42 U.S.C. §12131(2) (1990) and 29 U.S.C. § 705(20)(B) (2014). Plaintiffs have been and continue to be Medi-Cal beneficiaries and are on the NF/AH Waiver.

19. Plaintiff Jerry Thomas is 73 years old and has Progressive Supranuclear Palsy ("PSP"), a degenerative brain disorder that causes serious and progressive problems with gait and balance, eye movement, cognitive difficulties, and muscle weakness. His disease is progressive and thus symptoms will worsen over time. In addition to PSP, Mr. Thomas has Post-Polio Syndrome, quadriplegia, chronic pain syndrome, dysphagia (difficulty swallowing), chronic respiratory failure, recurrent

pneumonia and/or bronchitis, chronic constipation, chronic atelectasis (a complete or partial collapse of the lung), recurrent episodes of urinary tract infections ("UTIs"), and hypothyroidism, among other conditions. After 14 years of institutional placement, Mr. Thomas now resides at home with his wife of over 30 years, Beverly Thomas, who brought him home from a Subacute facility in 2013. She serves as his *Guardian ad Litem* in this litigation.

20. Plaintiff Sean Benison is 43 years old and has advanced hereditary progressive Becker Muscular Dystrophy; is quadriplegic; and has chronic respiratory failure, chronic pain disorder, anxiety disorder, DVT (thromboembolism) prophylaxis and reflux esophagitis. He lives on his own in his apartment, where he moved in October 2013 after living for two years in a Subacute facility.

21. Plaintiff Juan Palomares is 38 years old and had a complete spinal cord injury at the 4th vertebrae in the cervical (neck) part of his spine in 2005. He has quadriplegia and is dependent on others for all of his daily care needs. He is susceptible to recurring urinary tract infections and has recurring difficulties with his suprapubic catheter tube clogging. He has chronic pain, which must be managed with medications, including narcotics, on an as-needed basis. Mr. Palomares is subject to frequent (currently 5-6 episodes a week) and life threatening autonomic dysreflexia, which is an episode of acute, uncontrolled hypertension for which he requires frequent and skilled preventative care. Mr. Palomares lives with his father who is his primary caregiver.

22. Plaintiffs Thomas and Benison have a tracheal tube that is connected to a ventilator to help them breathe. Due to their mucous secretions and their inability to swallow due to the tracheotomy and loss of muscle function, Plaintiffs Thomas and Benison must be suctioned as needed, sometimes as frequently as four to five times an hour, when saliva builds up in the mouth, nose, and throat to avoid pooling of mucous or any fluid in the lungs. If fluid does go into the lungs, it could impair

oxygen exchange, resulting in lack of oxygen and permanent damage to organs (including brain injury), pneumonia, and infection. Plaintiff Benison uses a cuffed tracheotomy which is uncuffed during the day and allows for the possibility of communication/speech, but also allows fluid to go into the lungs if not timely suctioned. Plaintiff Thomas uses a cuffed trach at all times. During the night, Plaintiff Benison also uses a cuffed tracheotomy so he is not able to speak – which can be more dangerous since he is not able to communicate if they are in distress. Further, air leaks out of the cuff, and a nurse is required to keep adding air to the cuff and to monitor the ventilator settings to ensure Plaintiffs are properly ventilated: too much air puts pressure on the lungs and too little air can make them unconscious. Plaintiff Thomas has a Gastrostomy tube ("G-tube") for feeding and medication administration.

23. Plaintiffs are completely dependent on medical technologies for survival. Plaintiffs use wheelchairs for mobility at all times. Plaintiffs cannot move, turn, feed, dress, bathe or take care of themselves. They need total care for every daily activity.

24. Plaintiffs Thomas and Benison's in-home nursing care is provided by licensed vocational nurses ("LVNs" or "nurses"). LVNs are licensed to provide skilled nursing care in many settings including hospitals. 42 C.F.R. § 409.31(a) (2005); 22 Cal. Code Regs. §§ 70055(a)(16), 70055(a)(16) and 70217(a) (2013). These one-on-one skilled nursing services have been ordered by Plaintiffs Thomas and Benison's physicians because their care requires the exercise of judgment informed by experience and expertise in addressing the care needs of persons with severe disabilities and chronic illnesses. The services Plaintiffs Thomas and Benison require cannot safely be provided by untrained or unskilled individuals and are medically necessary.

25. Plaintiff Palomares' in-home care includes In-Home Supportive Services and Waiver Personal Care Services. Because of the severity of his

disability, his constant risk of autonomic dysreflexia and complications related to his catheter, Plaintiff Palomares requires, but does not receive, additional in-home attendant care, nursing care by licensed nurses, and nursing case management.

Defendant Department of Health Care Services

26. Defendant California Department of Health Care Services ("DHCS") administers the California Medicaid program, called "Medi-Cal." DHCS is the single state agency responsible for the administration of the Medi-Cal program.

27. Defendant Jennifer Kent is DHCS' current Director and is sued only in her official capacity. Director Kent is responsible for directing, organizing, and administering the Medi-Cal program, including Medi-Cal Home and Community-Based Services Waivers, in accordance with all applicable laws and regulations. As such, she is responsible for DHCS' compliance with state and federal laws governing the Medi-Cal program.

V. STATUTORY AND REGULATORY FRAMEWORK

A. THE MEDICAID PROGRAM

28. Medicaid is a joint federal and state medical assistance program for certain groups of low-income people, including children. 42 U.S.C. §§ 1396-1396v (2014). California has elected to participate in the Medicaid program, and so must comply with the requirements of the federal Medicaid Act and its implementing regulations.

29. The purpose of Medicaid is to furnish, as far as practicable, "medical assistance on behalf of . . . aged, blind or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services" and "to help such families and individuals to attain or retain capability for independence or self-care . . . ." 42 U.S.C. § 1396 (2014).

30. Participating States are reimbursed by the federal government for a portion of the cost of providing Medicaid benefits. *See* 42 U.S.C. § 1396b (2010).

The remaining funding for the Medi-Cal program comes from the State and from counties.

31. States participating in Medicaid must designate a "single state agency" to administer or supervise the administration of the Medicaid program. 42 U.S.C. § 1396a(a)(5) (2014). DHCS is the single state agency so designated in California.

32. The California Medi-Cal program provides an array of medical services, treatments, and therapies that are authorized based on individuals' meeting "medical necessity" criteria. Welf. & Inst. Code §§ 14059 (1969), 14059.5 (1985), and 14133.3 (2004); 22 Cal. Code Regs. § 51303(a) (2013).

Medi-Cal Home and Community-Based Services Waivers

33. The Centers for Medicare and Medicaid ("CMS") is the federal agency that oversees the administration of the Medicaid programs offered by each state. CMS has the authority to waive certain provisions of federal Medicaid law to allow states to provide home and community-based services ("HCBS") in lieu of institutional care, for targeted groups of individuals who otherwise would require care in a medical facility. 42 U.S.C. § 1396n(c)(1) (2010).

34. DHCS has been mandated by the Legislature to "seek all necessary waivers . . . in order to provide in-home and community-based care." Welf. & Inst. Code §§ 14132(t) (2014), 14137 (1986). DHCS routinely seeks and secures federal approval to renew and amend HCBS Waivers within permissible federal limitations.

35. HCBS Waivers in California include the Nursing Facility/Acute Hospital ("NF/AH") Waiver. The purpose of the NF/AH Waiver is to provide Medi-Cal beneficiaries with long-term medical conditions who meet one of the designated "levels of care" described below, the option of returning to and/or remaining in their homes or home-like community settings in lieu of institutionalization. The NF/AH Waiver application, which is submitted and approved by CMS, governs DHCS' administration of NF/AH Waiver services. The current version of the Waiver is State of California Department of Health Care

Services, Application for § 1915(c) HCBS Waiver Nursing Facility/Acute Hospital (NF/AH) Waiver, (12/1/2012 - 12/31/2016), http://www.dhcs.ca.gov/services/ltc/Documents/NFAH%20Transition%20and%20Diversion%20Waiver%2012-1-2012.pdf ("NF/AH Waiver") at 7-8.

36. In seeking federal approval for the NF/AH Waiver, DHCS gave assurances to CMS, including that: (a) Necessary safeguards have been taken to protect the health and welfare of participants receiving services under the NF/AH Waiver; and, (b) Plans of Care are responsive to NF/AH Waiver participants' needs. NF/AH Waiver at 9-10.

37. Under the umbrella of the NF/AH HCBS Waiver, DHCS administers several HCBS waivers which each correspond to an institutional level of care. The relevant levels of care for adults are: Nursing Facility Level A or B ("NF-A" and" NF-B"), Nursing Facility Subacute ("Subacute"), and Acute Hospital. Each of the HCBS Waivers contained in the NF/AH Waiver offers an array of home and community-based services, discussed below.

38. The level of care criteria for the NF/AH Home and Community-Based Services Waivers explicitly describe the type and level (or severity) of functional limitations and/or skilled nursing needs an individual must have to be admitted to an institutional setting. Upon meeting those eligibility criteria, or level of care, an individual may qualify for corresponding NF/AH HCBS Waiver services.

39. California offers various services under the NH/AH Waiver, including Private Duty Nursing, Waiver Personal Care Services, Case Management and Habilitation services that Plaintiffs are seeking. NF/AH Waiver at 59.

40. "Private duty nursing" services means individual and continuous care (in contrast to part-time or intermittent care) provided by a licensed nurse or a certified home health aide employed by a home health agency within the scope of state law. Private duty nursing services are provided in a recipient's home, home-

like environment or an approved out-of-home setting. 42 U.S.C. § 1396d(a)(9) (2012); 42 C.F.R. § 440.80 (1987); NF/AH Waiver at 196.

41. "Case Management" services are designed to assess the participant and determine the need for medical, psycho-social, social and other services and to assist participants in gaining access to those needed services, regardless of the funding source, to ensure the participant's health and safety and support of his/her home and community-based program. Case Managers also assist in securing personal care providers, work with the participant and his/her physician in developing goals and identifying a course of action to respond to the assessed needs of the individual, as well as oversee the implementation of the services described in the Plan of Treatment. Case Management responsibilities include assessing, care planning, locating, coordinating, and monitoring services for community-based participants on the waiver. Case Management may be provided by an array of provider types. NF/AH Waiver at 59-72.

42. "Habilitation Services" are provided in a participant's home or an out-of-home non-facility setting and are designed to assist the participant in acquiring, retaining, and improving self-help, socialization, and adaptive skills necessary to reside successfully in the person's natural environment. Habilitation services include training on: the use of public transportation; personal skills development in conflict resolution; community participation; developing and maintaining interpersonal relationships; personal habits; daily living skills (cooking, cleaning, shopping, money management) and community resource awareness to support independence in the community. It also includes assistance with: selecting and moving into a home; locating and choosing suitable housemates; locating household furnishings; settling disputes with landlords; managing personal financial affairs; recruiting, screening, hiring, training, supervising, and dismissing personal attendants; dealing with and responding appropriately to governmental agencies and

personnel; asserting civil and statutory rights through self-advocacy, and building and maintaining interpersonal relationships. NF/AH Waiver at 72-84.

43. "Waiver Personal Care services" ("WPCS") are services designed to assist Waiver participants in gaining independence in their activities of daily living and preventing social isolation, and assisting Waiver participants in remaining in their homes and being part of their communities. WPCS includes, *inter alia*, assistance with activities of daily living, adult companionship, housekeeping, food shopping, and other assistance to promote the participant's highest level of independence in self-care. NF/AH Waiver at 99-100. In order to meet federal cost-neutrality requirements, the NF/AH Waiver contains assurances that, in the aggregate for the entire NF/AH Waiver population, services provided in the community pursuant to the NF/AH Waiver will not exceed the cost of services in the institution designated for comparable care. NF/AH Waiver at 10. Defendants, however, have chosen to use an individual maximum benefit level, rather than an aggregate cost-cap. *Id.* at 26-27. Thus, each of the Waivers within the NF/AH HCBS Waiver correspond to an institutional level of care and have individual "cost-caps" depending on the Medi-Cal rate for their corresponding facility. These cost-caps allow a qualifying individual to choose from a menu of available home and community-based services but only up to the cost-cap for his or her level of care set by DHCS in the applicable HCBS Waiver. NF/AH Waiver at 26-27.

44. Defendants have set NF/AH Waiver cost-caps at all levels of care significantly below the annual rate Medi-Cal pays to institutions of the same level of care, as set forth below[1]:

[1] The current NF/AH Waiver contains only the Waiver cost-caps, but not the corresponding institutional rates. NF/AH Waiver at 27-28. The annual institutional rate is contained in the previous version of the NF/AH Waiver and is calculated using the weighted daily average rate for each facility type for 365 days a year.

Institutional Level of Care	Annual Institutional Rate (Based on 2007 NF/AH Waiver)	Annual Waiver Cost-Caps (Current in 2012 NF/AH Waiver)
Nursing Facility (NF)-A	$34,388	$29,548
Nursing Facility (NF)-B	$56,074[2]	$48,180
NF-B Pediatric	$110,280	$101,882
NF-Distinct Part	$124,342	$77,600
NF-Subacute, Adult	$271,697	$180,219
NF-Subacute, Pediatric	$282,574	$240,211
Acute Hospital	$437,757	$305,283

45. For individuals such as Mr. Thomas and Mr. Benison, who meet the institutional criteria and would otherwise be placed in a Subacute nursing facility, Defendants have arbitrarily set the cost-cap for NF/AH Waiver services at the adult Subacute level of care at $180,219, which is more than $90,000 below the rate for a Subacute facility. NF/AH Waiver at 27.

46. For individuals such as Plaintiff Palomares, who meet the institutional criteria for and would otherwise be placed in a Nursing Facility Level B, Defendants have arbitrarily set the cost-cap for NF/AH Waiver services at the Nursing Facility-B level of care at $48,180, which is more than $21,000 below the current rate of $70,000 for a Nursing Facility-B facility. NF/AH Waiver at 27. Moreover, the NF/AH Waiver cost-cap at the Nursing Facility-B level of care has remained flat at the 2007 level, while Nursing Facility level B facilities have received substantial rate increases each year.

47. Defendants will not authorize a level of HCBS waiver funding for home-based services which is comparable to the level of funding Medi-Cal would otherwise pay for institutional care. However, federal cost-neutrality requirements

[2] According to recent State analyses, the current rate paid by Medi-Cal to Nursing Facility Level B facilities is at least $70,000 annually.

do not prohibit Defendants from using an aggregate cost-cap, setting the Waiver cost-caps at or just below the rate paid to equivalent level of care facilities, or even exceeding the amount paid to those facilities so long as in the aggregate, the State's overall Medi-Cal spending remains cost-neutral.

48. CMS permits Defendants the option of authorizing NF/AH Waiver services to individual participants in excess of their individual cost limitation, but Defendants have not done so. NF/AH Waiver at 29. Defendants have declined to develop an exception process as a safeguard to enable participants to remain on the Waiver, but rather, have indicated to CMS that if a Waiver participant's service costs exceed the cost-cap set by Defendants, they will instead: 1) refer the individual to another Waiver; 2) assist the participant to identify lower cost services within the cost-cap; or 3) refer the individual for institutional placement. *Id.*

In-Home Supportive Services

49. The In-Home Supportive Services ("IHSS") program is the State's personal attendant care program pursuant to California Welfare and Institutions Code sections 12300 *et seq*. (2004), 4132.95 (2004), 14132.951 (2009), and 14132.952 (2009). The IHSS program pays for certain services so eligible recipients can remain safely in their homes. IHSS hourly wages are set county-wide throughout the State and vary by county.

50. To be eligible for IHSS, an individual must be over 65 years of age, or disabled, or blind. IHSS services include: housecleaning, meal preparation, laundry, grocery shopping, personal care services (such as bowel and bladder care, bathing, grooming and paramedical services), accompaniment to medical appointments, and protective supervision for the mentally impaired. Recipients may choose their IHSS workers, who must meet minimal requirements for approval, such as a background check, but who are not required to be licensed or skilled medical practitioners. The cost of IHSS services is factored into an individual's NF/AH

Waiver budget, thereby reducing the amount of Waiver services that can be provided.

B. ANTI-DISCRIMINATION LAWS

51. Qualifying individuals with disabilities are protected from disability discrimination, including segregation in institutions, by the ADA and Section 504.

52. In enacting the ADA, Congress found that "[i]ndividuals with disabilities continually encounter various forms of discrimination, including…segregation…" 42 U.S.C. § 12101(a)(5) (2008). Title II of the ADA provides that "no qualified individual with a disability shall, by reason of disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity or be subjected to discrimination by such entity." 42 U.S.C. § 12132 (1990).

53. Regulations implementing Title II of the ADA provide: "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d) (2010); *see also* Section 504, 29 U.S.C. §§ 794-794a (2014); 28 C.F.R. § 41.51(d) (1982). Further, "[t]he most integrated setting appropriate to the needs of a qualified individual with a disability means a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." 28 C.F.R. pt. 35, App. A, (2010).

54. The United States Supreme Court in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999) held that the unnecessary institutionalization of individuals with disabilities is a form of discrimination under Title II of the ADA. In doing so, the Court interpreted the ADA's "integration mandate" as requiring persons with disabilities to be served in the community when: (1) the state determines that community-based treatment is appropriate; (2) the individual does not oppose community placement; and (3) community placement can be reasonably accommodated. *Olmstead*, 527 U.S. at 607.

55. Regulations implementing Title II of the ADA and Section 504 also provide: "A public entity may not, directly or through contractual or other arrangements, utilize criteria or other methods of administration: (i) that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability; [or] (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the entity's program with respect to individuals with disabilities…" 28 C.F.R. § 35.130(b)(3) (2010); 28 C.F.R. § 41.51(b)(3)(I) (1982); 45 C.F.R. § 84.4(b)(4) (2005).

56. ADA regulations further provide: "[a] public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered." 28 C.F.R. § 35.130(b)(8) (2010); *see also* parallel Section 504 regulations, 45 C.F.R. § 84.4(b)(1)(iv) (2005).

57. As set forth in federal regulations: "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7) (2010).

58. Similar to the ADA, California's anti-discrimination statute prohibits discriminatory actions by the state and state-funded agencies or departments, and provides civil enforcement rights for violations. Cal. Gov't. Code §§ 11135-11139 (2011).

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VI. FACTS RELATED TO INDIVIDUAL PLAINTIFFS

JERRY THOMAS

59. Jerry Thomas was diagnosed with Progressive Supranuclear Palsy in 2007 at 66 years of age. Progressive Supranuclear Palsy is a degenerative brain disorder that involves a loss of muscle control impacting gait and balance, eye movement, and thought processes.

60. Mr. Thomas' in-home nursing services have been funded entirely by Medi-Cal.

61. Mr. Thomas lives at home with wife of over thirty years, Beverly Thomas. Mr. Thomas's wife is his primary care giver and his *Guardian ad Litem*.

62. Before Mr. Thomas became ill, he worked as a road manager for his brother, singer B.J. Thomas. When he was not spending time with his wife or working, most weekends Mr. Thomas was hunting with his dogs and family members.

63. Mr. and Mrs. Thomas desire that he continue living at home with appropriate nursing services.

64. Mr. Thomas is medically fragile and technology dependent. Mr. Thomas requires oxygen 24 hours a day and is connected to a ventilator at least 18 hours a day, and more when needed. He receives nutrition, hydration and medication through his G-tube. Mr. Thomas is non-ambulatory and cannot bear weight. He uses a wheelchair and requires assistance with all activities of daily living ("ADLs").

65. Mr. Thomas can no longer speak and is only able to communicate by blinking his eyes. Individuals need training to understand his body language for signs and symptoms of changes in his condition, need, and medical emergencies.

66. At age 66, when Mr. Thomas could no longer breathe on his own due to muscle weakness, he had a tracheotomy.

67. In order to control his symptoms and severe pain, he takes over 40 medications, including several narcotics and seven medications that are provided *pro re nata* ("PRN" as needed).

68. In addition to Progressive Supranuclear Palsy, Mr. Thomas has been diagnosed with Post-Polio Syndrome, among other conditions.

69. Mr. Thomas lived in a nursing facility for 14 years, until his wife was able to bring him home with services under the NF/AH Waiver. Since moving home on April 1, 2013, Mr. Thomas has been in the hospital or hospitalized several times including most recently in January 2015, as well as seen by his doctors on numerous occasions. Mr. Thomas is regularly seen by his pulmonologist and primary care physician, as well as a neurologist.

70. Since Mr. Thomas moved home, his condition has worsened due to the natural progression of his diseases. He now requires more time connected to the ventilator and takes additional medications to assist with his digestive and tracheotomy suctioning needs. In July 2014, Dr. Kayaleh, Mr. Thomas's treating physician, ordered for him to be provided with 24 hour nursing care.

71. Mrs. Thomas is not a licensed vocational nurse and is not capable of providing the additional nursing care that Mr. Thomas requires.

Mr. Thomas' Nursing Care Needs

72. As set forth in his Plan of Treatment approved by his physician, Mr. Thomas has frequent, ongoing, and unpredictable skilled care needs that must be addressed by a licensed nurse. These include, *e.g.,*: monitoring Mr. Thomas' oxygen saturation levels and providing skilled interventions when his oxygen levels drop below 92%, including breathing with ambu-bag, CPR, and calling 911; determining when Mr. Thomas must be placed on the ventilator during sprinting hours; monitoring and administering his medications including over 40 daily medications and seven medications to be taken PRN as needed for proper dosage, effectiveness, interactions, and side effects; monitoring the amount, sound, and color

of Mr. Thomas' secretions for signs of infection; monitoring the sound of Mr. Thomas' lungs to assess for a respiratory infection or blockage; monitoring and performing deep tracheal suctioning; monitoring the color, consistency, odor, and frequency of Mr. Thomas' urine and bowels for signs and symptoms of infections; administering and checking all equipment to ensure proper functioning and replace equipment or intervene as needed; monitoring feeding tolerance and knowing when Mr. Thomas' G-tube feeding should be stopped when he presents signs of abdominal pain and discomfort; monitoring, caring for, and replacing his trach stoma when necessary; taking and interpreting vital signs and knowing when they indicate a possible infection or when CPR is required; monitoring Mr. Thomas' entire system for signs of infection, change, or emergency; assessing and monitoring Mr. Thomas' skin for signs of infection, breakdown, or ulcers; and identifying and responding to emergencies.

In-Home Nursing Authorization

73. Before moving home from Chapman Subacute facility on April 1, 2013, Mr. Thomas was approved to receive 450 LVN hours under the NF/AH waiver at the Subacute level of care, along with 240.04 hours of IHSS, and 2 hours of RN case management. He and his wife accepted this combination of skilled and unskilled care because Mr. Thomas unquestionably required round-the-clock coverage, and they understood that, due to the Subacute Waiver cost-cap, he would not be able to receive the 24-hour nursing he needed.

74. On October 16, 2013, DHCS conducted a home visit to reassess Mr. Thomas' level of care. Based on the assessment, DHCS determined that Mr. Thomas remained eligible for the NF/AH waiver at the Subacute level of care. However, DHCS determined that the expenditures for the services he was receiving exceeded the NF/AH waiver cost-cap at the Subacute level of care, which is $180,219.00.

75. Even though Mr. Thomas' needs had increased due to the progression of his disease since his move home in 2013, DHCS issued a Notice of Action ("NOA") on January 9, 2014 reducing his in-home LVN nursing authorization to 430 hours per month. The NOA provided that the decrease in services was solely due to the cost-cap under the NF/AH waiver, not a change or improvement in Mr. Thomas' condition.

76. On February 10, 2014, Mrs. Thomas, on behalf of her husband, timely appealed DHCS' 20-hour per month nursing reduction by mail and requested aid-paid-pending. At Plaintiffs' request, DHCS reassessed Mr. Thomas in August 2014 but refused to authorize increased nursing hours for him.

77. On September 23, 2014, a Medi-Cal fair hearing was held, where Mr. Thomas presented his medical need for 24 hour nursing care, consistent with his doctor's July 2014 orders. On February 4, 2015, the Administrative Law Judge ordered DHCS to reassess Mr. Thomas' level of care in order to determine whether his health condition qualified him for the Acute Hospital level of care. DHCS has not yet performed a reassessment of Mr. Thomas and thus Mr. Thomas has not experienced a reduction or increase in his nursing care.

78. Because DHCS has the ability to "alternate", or overturn, the decision, or reassess him at a lower level of care at any time, even a favorable decision does not provide Mr. Thomas with permanent or adequate relief.

SEAN BENISON

79. Mr. Benison was diagnosed with progressive hereditary Becker Muscular Dystrophy when he was nine years old. Mr. Benison started using a manual wheelchair when he was 13 years old and a power wheel chair at age 21. Mr. Benison is quadriplegic. In addition to Muscular Dystrophy, Mr. Benison has chronic respiratory failure, chronic pain disorder, anxiety disorder, DVT (thromboembolism) prophylaxis and reflux esophagitis. Mr. Benison takes 19 different medications.

80. Mr. Benison is working towards a Ph.D. in Geography at the University of California, Santa Barbara ("UCSB"). He has a B.A. from California State University Northridge. He has a Master's degree in Geography from UCSB.

81. Mr. Benison lives in an apartment in Ventura, California with a live-in IHSS personal care worker. Mr. Benison's father, Edward Benison, does not provide any daily care but is involved in planning for and providing his care.

82. Mr. Benison and his family desire that he continue living at home with appropriate nursing services.

83. Mr. Benison's nursing care has been funded entirely by Medi-Cal.

84. While a student at UCSB, Mr. Benison was living in campus housing and had an IHSS care worker assisting with his needs. Mr. Benison also had close friends who helped with his care needs, which enabled Mr. Benison to enroll in and pursue graduate studies.

85. In November 2011, while a student at UCSB, Mr. Benison's health took a turn for the worse. Mr. Benison had a severe attack of pneumonia and was hospitalized at the Goleta Valley Cottage Hospital in Santa Barbara. He remained in the Subacute unit of the acute care hospital for two years before he moved out to his current apartment. While in the hospital, Mr. Benison could no longer breathe on his own. Mr. Benison had to undergo a tracheostomy due to the pneumonia and neuromuscular and lung weakness caused by the Muscular Dystrophy. Mr. Benison is now dependent on a ventilator 24 hours a day.

86. Mr. Benison is medically fragile and technology dependent. Until a few months ago, he had a G-tube for feeding and medication. Mr. Benison cannot walk, cannot move himself or even turn over in bed. Mr. Benison is non-ambulatory and cannot bear weight. He uses a wheelchair for mobility. He cannot feed himself and has limited use of his hands. He requires assistance with all activities of daily living.

87. Mr. Benison has been on the NF/AH Waiver since October 2013 when he moved out of the Subacute facility and into his own apartment in the community. At that time, DHCS authorized 416 hours per month of Medi-Cal funded one-to-one in-home, private duty nursing care through the NF/AH Waiver, based on its determination that Mr. Benison met the Subacute level of care. In order to remain within the cost-cap limitation at the Subacute level of care, he is authorized for 16 hours nursing coverage daily from Monday through Friday, and 8 hours of nursing coverage each on Saturdays and Sundays. Mr. Benison requires 24-hour care, and because he lives alone, Mr. Benison supplements his nursing care with 283 hours of unlicensed IHSS personal care aide hours per month. However, on weekends he does not have any nursing coverage for 16 hours each day, which leaves him at risk. Hence, a minimum of 8 hours more of private duty nursing each on Saturday and Sunday is necessary to keep Mr. Benison safely in his home.

Mr. Benison's Nursing Care Needs

88. As set forth in his Plan of Treatment approved by his physician, Mr. Benison has frequent, ongoing, and unpredictable skilled care needs that must be addressed by a licensed nurse. These include: monitoring Mr. Benison's vital signs to ensure they remain within parameters listed in the physician's orders, and instructing caregivers in proper vital sign monitoring; monitoring cardiac status and assessing for signs and symptoms of tachycardia (resting heart rate faster than normal); assessing Mr. Benison for signs and symptoms of pain; assessing for signs and symptoms of skin breakdown, rash and perfusion; instructing caregivers in measures to protect skin integrity; assessing for medication compliance, effectiveness and complications and instructing caregivers in medication dosages, schedules, effects and side effects, and any food and drug interactions; assessing Mr. Benison's level of consciousness, motor and sensory reflexes, and for progression of his muscular dystrophy; ensuring adequate respiratory function through trach care including mobilization of lung secretions; monitoring and

providing ventilator support and responding to signs and symptoms of respiratory distress; checking ventilator settings as per the physician orders; assessing Mr. Benison's lung fields for clear, crackles, wheezing or the absence of these in his breathing patterns; monitoring Mr. Benison's trach stoma for signs and symptoms of infection; monitoring Mr. Benison's abdomen for signs and symptoms of abdomen distention and constipation; monitoring Mr. Benison for signs and symptoms of urinary tract infections; and reporting significant findings and changes in Mr. Benison's condition as appropriate.

In-Home Nursing Authorization; Case Management and Habilitation Services

89. Currently, the cost to the Medi-Cal program for Mr. Benison's home care, including 416 hours per month of private duty nursing, 283 hours of unlicensed IHSS aides and his medical equipment and supplies, was approximately $180,219.00 per year. This is his maximum budget for NF/AH Waiver services because of the cost-cap imposed by DHCS.

90. Since January 2014, Mr. Benison's physician has ordered one-to-one private duty nursing care for him so that he can receive the 24-hour care that he needs to remain safely at home. Mr. Benison requested 24-hour nursing from Defendants in February 2014. Defendants deferred his request for 24-hour nursing and have not provided him with a written notice of action as to their decision. However, because Mr. Benison lives on his own, he relies on an unlicensed live-in IHSS aide as a backup care provider. In addition to the NF/AH Waiver cost-cap which would prevent Mr. Benison from receiving authorization for 24-hour nursing, DHCS will also not authorize direct care services, or any combination of direct care services, exceeding 24 hours of care per day under the NF/AH Waiver. NF/AH Waiver at 196. Therefore, Plaintiff Benison needs 24 hours of nursing care per day, but he also cannot give up his live-in backup caregiver. Thus, given the limitations of the existing NF/AH Waiver rules, he is requesting additional hours per month of nursing care to ensure that he can receive round-the-clock care.

91. Additionally, Mr. Benison needs Case Management Services and Habilitation services to help him organize his nurses and IHSS workers' schedules, enroll back in graduate studies, enable him to avail of social activities and community services, and gain an overall better quality of life. These services are available through the NF/AH Waiver, but are not available to Mr. Benison because of the Subacute Waiver cost-cap.

JUAN PALOMARES

92. Juan Palomares had a complete C-4 spinal cord injury in 2005 at age 28 due to a motor vehicle accident in which he was a passenger. As a result of the injury, he has quadriplegia and uses a power wheelchair. He is in constant pain, uses a suprapubic catheter, and is prone to autonomic dysreflexia episodes which is imbalanced reflex sympathetic discharge and leads to potentially life-threatening hypertension. Mr. Palomares experiences autonomic dysreflexia episodes approximately 5-6 times per week.

93. Mr. Palomares lives at home with his father, Manuel Palomares, who is also his primary caregiver.

94. Mr. Palomares' home care is provided through In-Home Supportive Services and Waiver Personal Care Services. Mr. Palomares' in-home services are funded entirely by Medi-Cal.

95. Mr. Palomares and his father desire that he continue living at home with appropriate in-home services.

96. Prior to Mr. Palomares' accident, Mr. Palomares had recently obtained his certification as a laboratory technician. His injury occurred when he was returning from a family funeral in San Diego to interview for a job as a lab technician.

97. Following Mr. Palomares' accident, he received care at the University of California San Diego hospital, where he was placed on a ventilator and had a tracheostomy. After approximately two months, he was taken off the ventilator, his

tracheostomy was closed, and he was transferred to the Rancho Los Amigos Rehabilitation Center in Los Angeles for acute rehabilitation.

98. After his discharge from Rancho Los Amigos, Mr. Palomares moved in with his sister for approximately two and a half months, where he received support only from In-Home Supportive Services. He then moved to the Palomares Rehabilitation and Nursing Center[3] in Pomona.

99. At the Pomona nursing facility, Mr. Palomares was admitted into the Subacute unit but was soon discharged to the Nursing Facility unit. During that time, he was experiencing episodes of autonomic dysreflexia 9-10 times per week. While at the Nursing Facility unit, Mr. Palomares also experienced recurring urinary tract infections, requiring intravenous ("IV") antibiotics. However, due to the high ratio of patients to nurses, the nurses were not able to quickly attend to his needs, and he had no method or alarm to alert them when he was having an emergency. As a result, Mr. Palomares was consistently in fear for his life while at the facility. Mr. Palomares stayed at the nursing facility for approximately one year.

100. In 2006, because of the difficulty the Pomona nursing facility had in meeting Mr. Palomares' intensive care needs, Mr. Palomares' father moved into an apartment that had room for Juan Palomares. Although Mr. Palomares' father had been in training to become a licensed contractor, he abandoned this career path in order to care for his son Juan around-the-clock. Plaintiff Palomares was not offered NF/AH Waiver services when he first came home. He applied for and began to receive NF/AH Waiver services in 2007.

101. Since moving home in 2006, Mr. Palomares has been hospitalized several times. In 2014, he went to the emergency room approximately 9-10 times when he was experiencing side effects from his pain medications or autonomic

[3] Although the nursing facility's name was the same as Mr. Palomares' last name, there is no relationship. The nursing facility is now called the Inland Valley Care Rehabilitation Center.

dysreflexia episodes. Mr. Palomares is regularly seen by a primary care physician, urologist, a podiatrist and a pulmonologist.

Mr. Palomares' In-Home Care Needs

102. As a result of his C-4 spinal cord injury, Mr. Palomares is quadriplegic, incontinent of bowel and bladder, unable to feed himself, and dependent for all of his Activities of Daily Living. He uses a power wheelchair for ambulation, which he operates by his chin and head and which has a recline feature that he uses every hour. He requires assistance to administer his medications. He also requires frequent repositioning due to his physical limitations, in order to assist with circulation and to prevent skin ulcers. Because of his health conditions and severe pain, Mr. Palomares takes numerous medications, including narcotics administered as needed due to his constant pain in his neck and shoulder.

103. The spinal cord injury has resulted in impairment of Mr. Palomares' sympathetic nervous system (autonomic dysreflexia), which has caused problems modulating body temperature and therefore hypothermia and hyperthermia episodes.

104. Mr. Palomares currently experiences about five to six autonomic dysreflexia episodes a week. A majority of the episodes happen at night or in the early morning hours. Such episodes may be triggered by, *e.g.*, a need for repositioning, excessive heat or cold, having something tight on his body (*e.g.*, shoe laces, a shirt), the position of his catheter tube, urinary or bowel obstruction, and inflammation of the stomach. He is at constant risk of having an autonomic dysreflexia episode. During an episode, his heart rate and blood pressure elevate to dangerous levels. If not treated immediately, by removing the triggering stimuli and (when necessary) administering anti-hypertensive medication, autonomic dysreflexia can lead to death.

105. Mr. Palomares undergoes treatments through an oscillating vest twice a day to keep fluids and mucus from pooling in his lungs including mobilization of

mucus. This treatment helps to prevent lung infections such as pneumonia and prevent the need for a ventilator.

106. Mr. Palomares has a system in place where he can voice activate 911 so he can be brought to an emergency room. He had approximately ten such emergency room visits last year, many because of difficult-to-control autonomic dysreflexia episodes.

107. Mr. Palomares sleeps on a special mattress with air chambers that fluctuate to reduce the risk of decubiti ulcers. His father wakes up every two hours at night to reposition him. During the evening when he is in his wheelchair which he operates with his chin and head, he reclines with his legs brought up at least once an hour to prevent pressure sores and autonomic dysreflexia episodes.

108. Mr. Palomares needs to be repositioned and cared for more frequently than he is currently, in order to reduce the incidence of autonomic dysreflexia episodes and prevent decubitus ulcers, but that is not possible without an increase in his NF/AH Waiver budget.

109. This past year Mr. Palomares was switched from a Foley catheter to a suprapubic catheter (which is inserted directly into his bladder) in order to reduce the incidence of urinary tract infections (UTIs) and the incidence of autonomic dysreflexia episodes related to Foley catheter erosion and UTIs. However, he has had chronic problems with the suprapubic catheter because the tubing clogs, triggering his autonomic dysreflexia episodes. In addition, the suprapubic catheter must be changed monthly, by a trained provider with experience in order to avoid obstructing.

In-Home Services Authorization; IHSS and Waiver Personal Care Services

110. As of January 1, 2015, the cost to the Medi-Cal program for Mr. Palomares' home care, including In-Home Supportive Services and Waiver Personal Care Services per month, and his medical equipment and supplies, was

approximately $48,180 per year. This is his maximum budget for NF/AH Waiver services because of the cost-cap imposed by DHCS.

111. Mr. Palomares receives daytime care from a paid attendant six days per week. His father provides all of his nighttime care, seven nights per week, and all day on Sundays.

112. Between 2007 and present, Mr. Palomares' medically necessary NF/AH Waiver in-home care services have been reduced at least twice, including once in 2013. This reduction was not because Mr. Palomares' care needs decreased. The Nursing Facility-B level of care cost-cap has remained at $48,180.00, but the hourly rate for attendant care services in his county has increased twice. Therefore, to maintain cost neutrality, DHCS reduced the number of in-home care service hours authorized under the Waiver. Mr. Palomares no longer receives any nursing services because of the last reduction in his Waiver budget, which forced him to accept only unlicensed attendant care in order to have as many hours of coverage each day that his Waiver budget would allow.

113. To address one of the reductions in NF/AH Waiver services, Mr. Palomares appealed DHCS' reduction of his Waiver Personal Care Services from 207 hours to 143 hours, which was effective March 22, 2013. The final administrative decision issued by DHCS concluded that DHCS correctly determined that Mr. Palomares' skilled care needs are consistent with the HCBS NF/AH Waiver Nursing Facility-B level of care and that the reduction of hours was proper in order to adhere to the annual Nursing Facility-B cost-cap of $48,180.

114. However, Mr. Palomares needs additional in-home care services in order to meet his round-the-clock needs, which include nursing care and nursing case management, and to enable him to hire additional care providers. Mr. Palomares needs a care provider to monitor him throughout the night and reposition him more frequently in order to reduce his recurrent episodes of autonomic dysreflexia. Additional attendant care would also enable him to bathe more

frequently, as this is a task that is very taxing to do as frequently as needed, given Mr. Palomares height of 6 feet and weight of 180 pounds.

115. With more attendant care hours, his father could have some additional relief, as he is providing paid and unpaid care and has difficulty managing both day and night care with the limited hours of in-home care covered under the Waiver.

116. In addition, Plaintiff Palomares requires reinstatement of case management by a Registered Nurse to supervise and assess his care. Mr. Palomares also requires a Licensed Vocational Nurse with experience in urology to change his suprapubic catheter, flush his port, and assess and monitor any changes to his condition, among other things.

117. In-home care services, including IHSS, skilled nursing, and Waiver Personal Care Services are available through the NF/AH Waiver, but are not available to Mr. Palomares because of the Nursing Facility-B Waiver cost-cap.

DEFENDANTS' ACTIONS PLACE INDIVIDUALS WITH DISABILITIES LIKE PLAINTIFFS AT RISK OF INSTITUTIONALIZATION AND VIOLATE THE LAW

118. Defendants have placed arbitrary cost-caps on home and community-based services provided under the NF/AH Waiver, which are far less than the actual rates for institutional facilities.

119. Defendants have great flexibility and discretion in their administration of the NF/AH waiver. They have the authority to make modifications to ensure that Medi-Cal recipients such as individual Plaintiffs receive sufficient and medically necessary NF/AH Waiver services to avoid institutional placement and receive the necessary services as their medical conditions require.

120. According to Plaintiffs Thomas, Benison, and Palomares' medical professionals, home is the safest place for them to maximize their health condition and prolong their lives. Placement in an institution, however, will almost certainly cause health deterioration and possible death within a short period of time.

121. Defendants are refusing to provide additional NF/AH Waiver services for individual Plaintiffs solely due to the fact that DHCS has imposed cost-caps on NF/AH Waiver services, which are lower than the equivalent institutional rates, and which are without medical justification, nor are they required by federal law.

122. Defendants' administration and imposition of the NF/AH Waiver cost-caps directly injures organizational Plaintiff IN SPIRIT. As a result of Defendants' illegal administration of the NF/AH waiver, IN SPIRIT's mission to enable clients to live safely at home is frustrated and its limited resources are diverted from other clients in order to serve NF/AH Waiver recipients whose at-home care needs would be met, but for the NF/AH Waiver cost-caps.

123. Without the appropriate level of NF/AH Waiver services to remain in their homes, qualified individuals with disabilities such as Plaintiffs will have no choice but institutional placement, which will separate them from their families and communities and also poses significant risks to their health.

VII. LEGAL CLAIMS

FIRST CLAIM FOR RELIEF

(Defendant Director Jennifer Kent)

Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq*.

124. Plaintiffs reallege and incorporate herein by reference each and every allegation and paragraph set forth previously.

125. Individual Plaintiffs are "qualified individuals with a disability" within the meaning of the ADA in that they have physical and/or mental impairments that substantially limit one or more major life activities, including their ability to live independently without support.

126. Individual Plaintiffs meet the essential eligibility requirements for Medi-Cal services, including services necessary to maintain them in their homes in the community.

127. Organizational Plaintiff IN SPIRIT represents the interests of individual Plaintiffs in that it provides assistance to individuals with disabilities to enable them to live in their own homes. IN SPIRIT's mission is thwarted by Defendant's actions, which hinder its ability to provide assistance and divert its resources from serving clients who would otherwise be served by the organization.

128. Defendant Jennifer Kent is the Director of Defendant DHCS, which has responsibility for providing Medi-Cal and state-funded home and community-based and institutional services, and is therefore a government entity subject to Title II of the ADA. 42 USC §§ 12131(1)(A) and (B) (1990).

129. Defendant is obligated under the ADA to administer its programs in a manner that enables qualified individuals with disabilities to live in the most integrated setting appropriate to their needs. Defendant's denial and reduction of adequate and medically necessary in-home services, and failure to provide qualified individuals with disabilities such as Plaintiffs with medically necessary NF/AH Waiver services, has denied them the services they need to remain safely in the community, thereby placing them at risk of institutionalization in violation of the ADA's integration mandate.

130. Defendant has discriminated against qualified individuals with disabilities such as Plaintiffs in ways that include arbitrarily setting cost-caps for the NF/AH Waiver far below the actual rate paid for institutional services in equivalent facilities, thus denying them funds for home and community-based services that would otherwise be available for institutional services.

131. Defendant has discriminated against qualified individuals with disabilities such as Plaintiffs by failing to provide reasonable modifications to programs and services in ways that include: failing to increase or eliminate the individual NF/AH Waiver cost-caps within federal cost neutrality limitations to enable them to receive adequate and medically necessary NF/AH Waiver services; and failing to create and implement an exception process for the NF/AH Waiver

cost-caps by which they could receive NF/AH Waiver services at a level adequate to meet their needs.

132. By denying Plaintiffs and other qualified individuals with disabilities adequate and necessary NF/AH Waiver services commensurate with their actual need, as opposed to arbitrary service limitations, Defendant has imposed eligibility requirements which unlawfully screen Plaintiffs out from fully and equally enjoying NF/AH Waiver services, and from receiving adequate care to remain safely at home.

133. Defendant has utilized criteria and methods of administration that subject Plaintiffs and other qualified individuals with disabilities to discrimination on the basis of disability, including risk of unnecessary institutionalization, in ways that include: (1) designing and implementing Home and Community-Based Services Waivers which set arbitrarily low cost-caps for NF/AH Waiver services, while paying significantly higher rates for the institutional alternative; and (2) imposing eligibility criteria, cost limitations and other criteria not required by federal limitations, which restrict in-home care in favor of institutional care.

134. Defendant's actions are in violation of Title II of the ADA.

135. Pursuant to 42 U.S.C. § 12133 (1990), Plaintiffs are entitled to declaratory and injunctive relief, as well as reasonable attorneys' fees and costs incurred in bringing this action.

SECOND CLAIM FOR RELIEF

(Defendant DHCS)

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 *et seq.*

136. Plaintiffs reallege and incorporate herein by reference each and every allegation and paragraph set forth previously.

137. Individual Plaintiffs are "qualified individuals with a disability" under Section 504 of the Rehabilitation Act of 1973, as amended – 29 U.S.C. § 794 and implementing regulations – in that they have physical and/or mental impairments

that substantially limit one or more major life activities, including their ability to live independently without support.

138. Individual Plaintiffs meet the essential eligibility requirements for Medi-Cal services, including services necessary to maintain them in their homes in the community.

139. Organizational Plaintiff IN SPIRIT represents the interests of individual Plaintiffs in that it provides assistance to individuals with disabilities to enable them to live in their own homes. IN SPIRIT's mission is thwarted by Defendant's actions, which hinder its ability to provide assistance and divert its resources from serving clients who would otherwise be served by the organization.

140. Defendant DHCS is a recipient of federal monies that provides Medi-Cal home and community-based and institutional services and other Medi-Cal services and is therefore a government entity subject to Section 504. 29 U.S.C. § 794(b) (2014).

141. Defendant's denial and reduction of adequate and necessary in-home nursing and refusal to provide NF/AH Waiver services has barred individual Plaintiffs from receiving the services they need to continue to live in the community, thereby placing them at imminent risk of institutionalization in violation of Section 504's integration mandate.

142. Defendant has discriminated against Plaintiffs in ways that include arbitrarily setting cost-caps for the NF/AH Waiver far below the actual rate paid for institutional services in equivalent nursing facilities, thus denying qualified individuals with disabilities such as Plaintiffs funds for home and community-based services that would otherwise be available for institutional services.

143. By denying qualified individuals with disabilities such as Plaintiffs adequate and necessary NF/AH Waiver services commensurate with their actual need, as opposed to arbitrary service limitations, Defendant has imposed eligibility

requirements which unlawfully screen them out from fully and equally enjoying NF/AH Waiver services, and from receiving adequate care to remain safely at home.

144. Defendant has utilized criteria and methods of administration that subject qualified individuals with disabilities such as Plaintiffs to discrimination on the basis of disability, including risk of unnecessary institutionalization, by, including but not limited to the following: (1) designing and implementing Home and Community-Based Services Waivers which set arbitrarily low cost-caps for NF/AH Waiver services, while paying significantly higher rates for the institutional alternative; and (2) imposing eligibility criteria, cost limitations and other criteria not required by federal limitations, which restrict in-home care in favor of institutional care.

145. Defendant's actions violate Section 504.

THIRD CLAIM FOR RELIEF

(Defendants DHCS and Director Kent)

Violation of Government Code Sections 11135 and 11139

146. Plaintiffs reallege and incorporate herein by reference each and every allegation and paragraph set forth previously.

147. Individual Plaintiffs are persons with disabilities within the meaning of California Government Code section 11135(c) *et seq*. (2011) and its implementing regulations.

148. Individual Plaintiffs meet the essential eligibility requirements for Medi-Cal services, including services necessary to maintain them in their homes in the community.

149. Organizational Plaintiff IN SPIRIT represents the interests of individual Plaintiffs in that it provides assistance to individuals with disabilities to enable them to live in their own homes. IN SPIRIT's mission is thwarted by Defendants' actions, which hinder its ability to provide assistance and divert its resources from serving clients who would otherwise be served by the organization.

150. Defendants DHCS and Director Kent conduct, operate or administer the state Medicaid program, entitled Medi-Cal, which is directly funded, in part, by state financial assistance within the meaning of California Government Code section 11135(a) and implementing regulations.

151. Defendants are obligated to administer their programs in a manner that enables qualified individuals with disabilities to live in the most integrated setting appropriate to their needs. Defendants' denial and reduction of adequate and medically necessary in-home nursing, and failure to provide qualified individuals with disabilities such as Plaintiffs with medically necessary NF/AH Waiver services, has denied them the services they need to remain safely in the community, thereby placing them at risk of institutionalization in violation of the integration mandate of California Government Code section 11135.

152. By administering its programs in ways that deny qualified individuals with disabilities such as Plaintiffs NF/AH Waiver services commensurate with their actual need, and instead imposing arbitrary cost limitations on the services they may receive, Defendants have discriminated against them , thereby excluding them from participation in, denying them the benefits of, and otherwise subjecting them to discrimination in violation of California Government Code section 11135 *et seq*. and implementing regulations.

153. Plaintiffs further allege that violations of their rights under the Americans with Disabilities Act and implementing regulations contained in the First Claim for Relief are incorporated herein and constitute a violation of California Government Code section 11135 *et seq*. as well, as set forth in section 11135(b).

VIII. ALLEGATIONS CONCERNING INJUNCTIVE AND DECLARATORY RELIEF

154. Defendants' actions, as alleged herein, have resulted in and will continue to result in irreparable injury to Plaintiffs and other qualified individuals with disabilities caused by the refusal to cover medically necessary services under

the NF/AH waiver, which they need to remain in their homes and avoid unnecessary institutional placement. Plaintiffs have no plain, speedy or adequate remedy at law.

155. IN SPIRIT is also subject to irreparable injury as a result of the NF/AH Waiver cost-caps, for it provides financial aid to NF/AH Waiver recipients to supplement at-home care which would otherwise be covered by the NF/AH Waiver, but for imposition of the cost-caps. IN SPIRIT's mission is thereby impeded, where funds are put toward assisting NF/AH Waiver recipients with home care needs, rather than funding non-Waiver recipients.

156. An actual controversy exists between Plaintiffs and Defendants, in that Plaintiffs claim that Defendants have failed to provide services in the most integrated setting appropriate to meet the needs of qualified individuals with disabilities such as Plaintiffs in violation of federal and state law and Defendants deny all such contentions.

157. Defendant Kent can either adopt or "alternate" (reject in whole or part) any administrative decision arising out of claims against DHCS. California Manual of Policies and Procedures, Sections 22-061 and 22-062. Therefore, the administrative appeal process offers no remedy or protection to Plaintiffs, as the Defendants in this action are the very entity which will make a determination of what NF/AH Waiver services will be provided to Plaintiffs.

158. The needs of qualified individuals with disabilities such as Plaintiffs can be reasonably accommodated by Defendants in a number of ways such as: increasing the individual NF/AH Waiver cost-caps commensurate with institutional costs; replacing individual NF/AH Waiver cost-caps with an aggregate cost-cap; establishing an exception process for requesting additional services and/or preventing reductions in service; and/or modifying any of their Home and Community-Based Services Waivers to permit these individuals to receive the services that they require and that their physicians have ordered.

159. Defendants have the option to administer the NF/AH Waiver so as not to create a bias towards institutional placement. Instead, Defendants have chosen to administer the NF/AH Waiver in such a way as to discriminate against qualified individuals with disabilities such as Plaintiffs, and to place them at risk of institutional placement, with life threatening consequences.

IX. REQUEST FOR RELIEF

WHEREFORE, Plaintiffs pray that the Court order the following relief and remedies on behalf of themselves and all others similarly situated:

A. Assume jurisdiction over this action and maintain continuing jurisdiction until Defendants are in full compliance with every order of this Court;

B. Declare that Defendants' imposition of arbitrary NF/AH Waiver cost-caps, which deny qualified individuals with disabilities such as Plaintiffs sufficient NF/AH Waiver services to meet their undisputed needs, and Defendants' policies, practices, acts and omissions as set forth above violate:

i. The Americans with Disabilities Act ("ADA"), (42 U.S.C. §§ 12101-12213 (2008)) and implementing regulations.

ii. Section 504 of the Rehabilitation Act ("Section 504"), (29 U.S.C. §§ 794-794a (2014)) and implementing regulations; and,

iii. California Government Code section 11135. (Cal. Gov't. Code § 11135 (2011)) and implementing regulations.

C. Grant a temporary restraining order and preliminary injunction enjoining Defendants, their officers, agents, employees, attorneys, successors, and all persons who are in active concert or participation with them from reducing medically necessary Medi-Cal funded in-home care below Mr. Thomas' current level of 450 hours per month of licensed vocational nursing care, two hours per month of RN care and 240.04 hours per month of IHSS personal care services until such time as the matter before this Court may be finally decided.

D. Grant a permanent injunction enjoining Defendants, their officers, agents, employees, attorneys, successors, and all persons who are in active concert or participation with them from discriminating against qualified individuals with disabilities such as Plaintiffs including placing them at risk of unnecessary institutionalization, by:

i. Failing to offer reasonable modifications to their programs and policies to enable them to receive medically necessary in-home nursing as ordered by their physicians;

ii. Failing to offer reasonable modifications to their programs and policies to enable them to receive other NF/AH Waiver services like Case Management, Habilitation services, and Waiver Personal Care Services;

iii. Imposing eligibility requirements which unlawfully screen them out of the NF/AH Waiver program and prevent them from fully and equally enjoying NF/AH Waiver services, and from receiving adequate care to remain safely at home;

iv. Utilizing criteria and methods of administration that subject them to discrimination on the basis of disability, including placing them at risk of unnecessary institutionalization.

E. Issue an order requiring Defendants to:

i. Authorize Medi-Cal funded services for Plaintiffs through the Nursing Facility/Acute Hospital Waiver or other appropriate Home and Community-Based Services Waivers, subject to federal cost neutrality requirements, to enable them to receive medically necessary services commensurate with their needs;

ii. Amend their policies and procedures consistent with the injunction above, and to require that Nursing Facility/Acute Hospital Waiver participants be provided with medically

necessary Medi-Cal in-home services, commensurate with their assessed needs, and as identified by their treating physicians, consistent with federal cost neutrality requirements.

F. Retain jurisdiction over the Defendants until such time as the Court is satisfied that Defendants' unlawful policies, practices, and acts complained of herein cannot recur.

G. Award Plaintiffs the costs of this action and reasonable attorneys' fees pursuant to 20 U.S.C. § 794a (2014); 42 U.S.C. §§ 12133 (1990), 12205 (1990); California Code of Civil Procedure section 1021.5 (1993); and as otherwise may be allowed by law.

H. Grant such other and further relief as the Court deems to be just and equitable.

Respectfully submitted: DISABILITY RIGHTS CALIFORNIA

Date: July 7, 2015

/s/
Elissa Gershon
Attorneys for Plaintiffs