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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA - SACRAMENTO DIVISION

Plaintiffs and Petitioners **ARC of CALIFORNIA**, and UNITED CEREBRAL PALSY ASSOCIATION of SAN DIEGO,

Plaintiffs,

v.

Toby Douglas, Director of the California Department of Health Care Services; CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES; Terry Delgadillo, in her official capacity as Director of the California Department of Developmental Services; CALIFORNIA DEPARTMENT OF DEVELOPMENTAL SERVICES; and DOES 1-100, inclusive,

Defendants.

Case No.

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

[Notice of Motion and Motion for Preliminary Injunction; Declarations of Dave Schneider, David Carucci, Darla Benson, Judy Rodgers, Gerald F. Kominski, Ph.D.; and Exhibits thereto; Request for Judicial Notice, and; and [Proposed] Order Granting Motion for Preliminary Injunction filed concurrently herewith]

Plaintiffs seek an order from this Court enjoining Toby Douglas, in his capacity as California's Director of the California Department of Health Care Services, and Terry Delgadillo, in her official capacity as California's Director of the California Department of Developmental

Services State of California (hereinafter collectively the "Directors"), from violating federal and state laws by implementing and enforcing certain budgetary measures directed at reducing funding to community-based Medi-Cal providers of residential and non-residential services and supports to individuals with intellectual and developmental disabilities under California's developmental disabilities service system. Plaintiffs submit that the defendants' actions violate and are incongruous with applicable federal and state laws.

INTRODUCTION

1. The Parties

The Arc of California (hereafter "ARC") is a nonpartisan, nonprofit statewide organization, the members or constituents of which consist of Medi-Cal eligible individuals with intellectual and developmental disabilities ("individuals with I/DD") who receive services and supports under the state's Medicaid funded developmental disability service system ("consumers"), and community-based service providers or vendors responsible for providing direct services and supports to consumers. United Cerebral Palsy Association of San Diego ("UCP") is a nonpartisan, nonprofit organization which provides direct, community-based residential and non-residential services and supports to consumers. ARC and UCP share a common mission, which is to serve and support the rights of individuals with I/DD to community-based services and supports directed at maximizing opportunities and choices for consumers in terms of living, working, learning, and recreating in the community" and that enable them to lead meaningful and productive lives in their communities.

Defendant Toby Douglas is the Director of the California Department of Health Care Services ("DHCS"), which is the state administrative agency charged with the administration of its Medicaid program – i.e., Medi-Cal. Defendant Terri Delgadillo is the Director of the California Department of Developmental Services ("DDS"), which is the state administrative agency charged with administering California's developmental disabilities service system through which consumers are provided community-based services and supports.

2. California's Developmental Disabilities Service System

California's developmental disability service system is reflected in the Lanterman Developmental Disabilities Services Act, Division 4.54 of the California Welfare and Institutions

Code ("Lanterman Act"). The service system currently provides services and supports to more than 244,000 consumers, and that number is expected to grow to over 250,000 consumers in the 2011-2012 fiscal year.[1]

The DDS is charged with the administration of the Lanterman Act and it is obliged to take "all necessary actions" to achieve the objectives of the Act and, in particular, to ensure the provision of "high quality services and supports to consumers and their families." (Welf. & Inst. Code § 4434(b)) In this regard, the DDS is responsible to securing " appropriate agencies to provide fixed points of contact in the community for persons with developmental disabilities and their families, to the end that these persons may have access to the services and supports best suited to them throughout their lifetime." (Id., § 4620(a)) The DDS performs its duties through twenty-one (21) private non-profit entities, referred to as "Regional Centers," which contract with community-based vendors to provide direct services and supports to consumers.

Since Fiscal 1998-99, the DDS has been statutorily charged with developing a method of rate setting for community service providers or vendors that reflect consumer and family centered outcomes and the cost of ensuring high quality and stable services.[2] Toward that end, the DDS is responsible for "develop[ing], establish[ing], and maintain[ing] an equitable system of rates of state payment for care and services purchased by the department from community care facilities . . . [which] rate system shall be flexible and reflect the differing costs associated with the differing types and levels of care and services provided." (Cal Welf. & Inst. Code § 4786; emphasis added.)

Most vendors are Medi-Cal providers and reply substantially if not entirely on payments from the state for services and supports provided to consumers. The compensation paid to vendors is based directly on the system of rate setting administered by the DDS.

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[1] The overall number of consumers has increased by 57 percent since 2000, while the general population of California has grown by only 14 percent during this same period.

[2] SB 1038 (Chapter 1043, Statutes of 1998, Thompson) and AB 2780 (Chapter 310, Statutes of 1998, Gallegos-Trailer Bill)

3. Freezes and Reductions in Payments to Vendors since 2003

In 2003, the state froze reimbursement rates for community vendors and, since then, those rates have not been increased despite substantial increases in operating costs. Beginning in 2009, California's legislature enacted bills directed at reducing payments to community vendors through means of cutting and freezing reimbursement rates by 4.25 percent. On February 20, 2009, Governor Arnold Schwarzenegger signed into law SBX 3 6 cutting reimbursement rates by 3 percent for the period from February 1, 2009 to June 30, 2010; subsequently, on October 19, 2010, Governor Schwarzenegger signed into law SB 853 which reduced reimbursement rates by an additional 1.25 percent for the period from July 1, 2010 through June 30, 2011. On March 24, 2011, California's new Governor, Edmond G. Brown, signed into law AB 104, which extended the mandated reductions in payments to community providers through June 30, 2012.

In addition, the state has sought to reduce funding to vendors through indirect means. On July 28, 2009, Governor Schwarzenegger signed into law ABX 4 9, which amended Welfare & Institutions Code § 4692(a) to mandate fourteen (14) unpaid holidays, on which days vendors are not reimbursed for services or supports provided to consumers.. The practical effect of the unpaid holidays is to further reduce payments to providers.

The aforementioned legislation enacted is reflected in "trailer bills" in that they act as specific enforcement of the primary Budget Act. Because trailer bills are not heard in the traditional manner and are not filtered through Policy Committee, it is typically not possible to ascertain specific legislative intent. However, the legislative intent behind the reductions in payments to community providers is reflected in the common language found in the legislation: "This act addresses the fiscal emergency declared by the Governor by proclamation on December 19, 2008, pursuant to subdivision (f) of Section 10 of Article IV of the California Constitution."

4. Impact of Cuts on the State's Service Delivery System

The state was warned ten years ago by the DDS that its inadequate funding of the rate setting system for community vendors would have a significant negative impact on the state's developmental disability service system. More specifically, the DDS warned that inadequate funding would threaten the financial viability of vendors, destabilize the service delivery system,

perpetuate the "continued and rapid deterioration of service delivery," and create a "significant risk to the health, safety, and well-being of consumers." (Decl. of _____, Exhibit "__")

The past seven years of the rate freezes, coupled with spiraling costs, have caused vendors' operating costs to exceed their Medi-Cal payments. This has imposed a significant financial strain on vendors that has forced them to make substantial cuts in their operating budgets by limiting and terminating programs, cutting back on staff, and reducing staff salaries and benefits. However, despite those cuts vendors have not been able to bridge the ever-widening gap between the state's rate-based payments and their actual operating costs. As a result, vendors have had to operate programs at a loss and incur mounting deficits in order to continue to provide needed services and supports to consumers. (Decls. of David Carucci at _____;) Further, some providers have had to rely on cash reserves and loans in order to continue operating. The state's rate cuts and freezes will be will threaten the solvency of a great number of vendors which, in turn, will degrade the state's service system, and jeopardize the health, safety, and well-being of potentially tens of thousands of consumers. (See DDS 2000-01 Report, Exhibit "__" to Kominski Decl.)

The financial problems experienced by vendors has already adversely impacted the delivery of quality services and supports to consumers and their families. Vendors have been forced to cut back on staff salaries and benefits, and that has caused them to experience higher turnover rates among direct care staff. An additional staffing problem stems from vendors' being unable to offer competitive salaries and benefits, which hinders vendors efforts to recruit and retain skilled staff to replace the skilled staff lost to better paying jobs. As anticipated by the DDS ten years ago, the result of these problems has been to de-stabilize the service system and contribute to the rapid deterioration of the quality and suitability of care available to consumers and their families. This has significantly increased the risk to consumers.

Another impact of the state's inadequate funding of vendors' rate setting system will be reflected in the likely difficult of the state to recruit and retain adequate qualified vendors to replace departing vendors and to otherwise meet the increasing demands on the service system. Prospective vendors, particularly more qualified ones, will likely be hesitant to become community providers

given the state's chronic inadequate funding of vendors. In order to meet the increasing need for providers, the state will likely need to lower its recruitment standards and streamline the vendorization process, which will contribute further to the deterioration of the service system and the associated increased risks to consumers.

An indirect consequence of the state's rate cuts and freezes will be reflected in an increasing disparity in the adverse impact of the inadequate payments on a class of consumers who, because of the nature and/or severity of their conditions, require a greater or higher level of care involved higher costs. Impoverished vendors may find themselves forced to cost cutting measures that target services and supports involving higher costs, such as programs requiring a greater or higher level of staffing. Those services and supports may be disproportionately subjected to cut backs and terminations which reduce the availability of service programs suitable to meet the needs of those consumers. This problem will likely be exacerbated by vendors who, because they are experiencing staffing problems, may have to cut back or terminate programs requiring a greater or higher level of staffing. Even vendors having adequate numbers of staff may be reluctant to provide such services based on concerns over their ability to adequately meet the particular needs of consumers who require more skilled direct care staff.

In any case, the ultimate impact of these problems will be reflected in fewer or more limited programs suited for consumers with greater needs, which will result in those consumers having less access to needed services and supports.

5. The State's Response to Threats to Vendors' Solvency

In apparent recognition of the threats posed by inadequate funding stemming from grossly low rates, the state has undertaken to 'soften' the financial impact of the cuts by reducing expectations and lowering operating standards for vendors.[3] This is reflected in part in the state's limited exemption of vendors from the 4.25 percent rate cut where they cam establish that the reduced rate would "necessarily" threaten a consumer's health and safety. (See Legislative Counsel's Digest on AB 104, at section (13)) It is also reflected in the legislature's previous

[3] In its 2000 report the DDS observed that

enactment amending Welfare & Institutions Code section 4791 to allow vendors impacted by the rate cut to operate under lower, presumably less costly standards relating to personnel requirements, functions, or qualifications, or staff training requirements for providers. (Section 4791(a)(b); see also subdivisions (d)(e) pertaining to temporarily suspended auditing and reporting requirements) A vendor would be precluded from employing the lowering standards if it were shown that they would "adversely affect the health and safety of a consumer," result in a consumer receiving services in a more restrictive environment," or "[n]egatively impact the availability of federal financial participation." (Id.(b).) No consideration is given to any negative impact on the accessibility or quality of care available to consumers.

6. The State's Failure to Comply with Medicaid Requirements.

The DHCS has sought federal approval to implement the reductions in payments to vendors through an amendment to the State Medicaid Plan ("SPA"). However, the CMS has not given its approval to the state's SPA. Nevertheless, the state and the Directors have expressed their intent to implement and enforce the 4.25 percent rate cut and freezes, as well as the mandatory unpaid holidays. (See DDS May 2011 Report, Exhibit "__" to Kominski Decl.)

In addition, the Directors seek to implement and enforce the reductions in payments to community providers without considering the potential impact of the rates on the "quality of care" and "equal access" provisions on Section 30(A). Further, they have not considered whether the rates, frozen since 2003, bear any reasonable relationship with vendors' costs of providing quality services and, if so, whether the rates are nevertheless justified, nor have they to consider or rely on any responsible reliable data from cost studies in determining vendor rates.

7. The State's Reductions in Payments Will Have a Disparate Impact on Certain Consumers

Some consumers, due to the nature or severity of their disabilities, require a greater or higher level of care, such as additional or more skilled direct care staff, which level of care involves higher costs. Community vendors under severe financial strain will likely be forced to make budget cuts that will require limiting and/or closing service programs, cutting staff, and reducing salaries and benefits. In order to remain financially viable, vendors will likely be forced to target more costly services and supports for budgetary cuts. In addition, vendors, primarily for-profit vendors, may

be forced to employ measures amounting to 'risk selection' in order to align or adjust their operating budgets to the state's funding of their programs. Consumers requiring a higher, more costly levels or quality of care may be confronted with less accessible and suitable services and supports.

8. Relief Sought

Plaintiffs request an injunction enjoining the state and he Directors from implementing or enforcing the 4.25 percent rate cuts and freezes and the mandatory unpaid holidays until such time as:

1. They receive approval from the CMS approving the subject SPA;
2. They demonstrated compliance with Section 30(A), in particular its "quality of care" and the "equal access" provisions; and
3. They have demonstrated their consideration of potential disparate impacts of the reduction in payments to vendors on consumers who, because of the nature or severity of their conditions, need greater or higher levels of care involving higher costs.

In addition, Plaintiffs request that the Court issue a writ of mandate directing the Directors to comply with federal law as described in the preceding paragraph before making any effort to implement or enforce the aforementioned reductions in payments to vendors. Further still, the plaintiffs seek an writ of mandate directing the state and the Director of the DDS to comply with the requirements of the Lanterman Act in terms of the following:

1. Developing, establishing and maintaining an equitable system of reimbursement rates for community-based residential and non-residential providers in compliance with California Welfare & Institutions Code section 4434(b);

2. Demonstrate that the state has relied on responsible cost studies providing reliable data in connection with its rate setting methology; and

3. Demonstrate that a justification for any rates substantially deviating from vendors' costs or, alternatively, to demonstrate that the state's rates bear a "reasonable relationship" to the cost of a vendor providing quality services; and

4. Demonstrating that the DDS is taking "all necessary steps" to ensure that consumers and their families receive high quality care well suited to the particular needs of consumers in compliance California Welfare & Institutions Code section ____.

FEDERAL & STATE STATUTES

I. Federal Medicaid Act.

Medicaid is a cooperative federal-state program through which the federal government provides financial assistance to states so that they may furnish medical care to needy individuals. (42 U.S.C. § 1396; ***Wilder v. Virginia Hospital Assn*. (1990) 496 U.S. 498, 502 [110 L. Ed. 2d 455, 110 S. Ct. 2510]**) Although state participation is voluntary, a state choosing to participate must prepare and submit for federal approval a 'State Plan', which is a comprehensive written statement describing the nature and scope of its Medicaid program and assuring it will be administered in conformity with the requirements of Medicaid law. (***Wilder v. Virginia Hospital Assn., supra*, at p. 502**; see ***Orthopaedic Hosp. V. Belshe*, 103 F.3d 1491, 1493 (9th Cir. 1997)** [***"Orthopaedic Hospital"***)

The Medicaid program is administered by the Centers for Medicare & Medicaid Services ("CMS"), on behalf of the Secretary of the United States Department of Health and Human Services, and CMS is responsible for approving State Plans. A state seeking to change its approved Medicaid plan must submit a State Plan Amendment ("SPA") to CMS so CMS may determine whether the amended State Plan continues to comply with federal requirements. (42 C.F.R. § 430.12) When a state submits a SPA for federal approval, a state Medicaid agency may not implement the proposed amendment until federal approval is actually obtained. (See *Exeter Memorial Hosp. Ass'n v. Belshe*, 145 F.3d 1106 (9th Cir. 1998))

A state electing to participate in the Medicaid program must also comply with certain procedurals requirements contained in the Medicaid Act, including 42 U.S.C. 1396(a)(30)(A) (hereafter "Section 30(A)"), which provides that prior to establishing reimbursement rates, a state must provide "methods and procedures" for the payment of care and services that (1) are "consistent with efficiency, economy, and quality of care," and (2) ensure their availability to the Medicaid

population to the same "extent as they are available to the general population in the geographic area."

States are obliged to ensure that their rates bear a "reasonable relationship" to the costs of vendors' quality services. (See *Orthopaedic Hospital*, 103 F.3d at 1496; see also *Indep. Living Ctr. of S. Cal. v. Maxwell-Jolly*, 572 F.3d 644, 651–52 (9th Cir. 2009) [affirming standards set in *Orthopaedic Hospital*]) In cases where a rate substantially deviates from a vendor's costs, the state must demonstrate a justification for the deviation. (Id.) Under federal guidelines, an analysis of rates obliges a state to"rely on responsible cost studies, its own or others', that provide reliable data as a basis for its rate setting." (***Orthopaedic Hospital***, 103 F.3d at 1496; *California Pharmacists Assn. v. Maxwell-Jolly* (9th Cir. 2010) 596 F.3d 1098, 1109, citing *Independent Living Center of Southern California v. Maxwell-Jolly* (9th Cir. 2009) 572 F.3d 644, 652, fn. 9; *Mission Hospital*, *supra*, 168 Cal.App.4th at pp. 473-474.)

II. The Lanterman Act.

California's Medicaid program is known as the California Medical Assistance Program, or "Medi-Cal." As the single state agency responsible for the Medi-Cal program, DHCS supervises and administers the State Plan and, in doing so, it is responsible for ensuring that the Medi-Cal program provides for covered services to eligible beneficiaries and for reimbursing vendors for providing those covered services in compliance with the State Plan and with federal and state laws and regulations. (42 C.F.R.1. §§ 431.1, 431.10) California's developmental disability service system, as reflected in the Lanterman Act, is part of the Medi-Cal program and it is described in the State Plan.

In enacting the Lanterman Act, the Legislature acknowledged and accepted the state's responsibility to "ensure and uphold the rights of persons with development disabilities," as well as its "obligation to ensure that laws, regulations, and policies on the rights of persons with developmental disabilities are observed and protected." (Cal. Welf. & Inst. Code section 4433) The Legislature placed the Lanterman Act under the jurisdiction of the DDS and charged it with taking "all necessary actions" to achieve the objectives of the Act, particularly in terms of providing "high

quality services and supports to consumers and their families." (Id. at 4434(b)) The state's service system was intended and designed to provide a "pattern of facilities and services . . . sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life." (Id., at Section 4501)

Because of the "special and unique nature" of the services and supports needed by individuals with I/DD and their families, the Legislature concluded that those services and supports cannot be "satisfactorily be provided by state agencies or regional centers," and that those services needed to be secured through contracts with private community service providers. (See) Accordingly, the Lanterman Act directs the DDS to "contract with appropriate agencies to provide fixed points of contact in the community for persons with developmental disabilities and their families, to the end that these persons may have access to the services and supports best suited to them throughout their lifetime." (Id. § 4620(a)) The Act further directs the DDS to "develop, establish, and maintain an equitable system of rates of state payment for care and services purchased by the department from community care facilities . . . [which] rate system shall be flexible and reflect the differing costs associated with the differing types and levels of care and services provided." (Id. § 4786) With respect to residential providers, the DDS' responsibility in setting rates is to "ensure that the provider can meet the special needs of persons with developmental disabilities and provide quality programs required by this article or community living facilities." (W&I § 4680) As for non-residential providers, the DDS is obliged to set rates that serve to "assure that regional centers may secure high-quality services for developmentally disabled persons from individuals or agencies vendored to provide these services" (Id. § 4690)

III. The ADA, The Rehabilitation Act, and the Unruh Civil Rights Act

Both federal and state law prevents public entities from discriminating against individuals based on their disabilities; this law is set forth in the Americans with Disabilities Act 42 U.S.C. §§ 12101, et seq. 3 (the "ADA"), Section 504 of the Rehabilitation Act, 29 U.S.C. §§ 794, et seq. 4 ("Rehabilitation Act"), and the Unruh Civil Rights Act, Cal Civ. Code § 51(f) ("Unruh Act"). Claims under the ADA and Rehabilitation Act may be analyzed together because there is no

material difference in the analysis of the rights and obligations created under those Acts. (***Martin v. Cal. De[pt. Of Veteran Affairs*, 560 F.3d 1042, 1047 fn. 7 (9th Cir. 2009)**) In addition, the violation of an individual's right under the ADA is deemed to also constitute a violation of the state's Unruh Act. The protections afforded under these laws is interpreted and applied broadly and liberally in order to effectively implement the strong public interest in preventing discrimination against disabled people. (*Barden v. City of Sacramento*, 292 F.3d 1073 (9th Cir. 2002) [ADA's fundamental purpose of providing a clear and comprehensive national mandate for elimination of discrimination against individuals with disabilities])

ADA and Rehabilitation Act regulations provide, *inter alia*, that "[a] public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration . . . [t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability . . . ." (See ***Cota v. Maxwell-Jolly*, 688 F.Supp.2d 980**, citing to 28 C.F.R. § 35.130(b)(3) (emphasis added); see also 28 C.F.R. § 41.51(b)(3) [regulation under the Rehabilitation Act]) A "methods of administration" claim brought under those regulations applies to written and actual policies, and its scope is intended to prohibit both "blatantly exclusionary policies or practices" as well as "policies and practices that are neutral on their face, but deny individuals with disabilities an effective opportunity to participate." (Id., citing to 28 C.F.R. Pt. 35, App. A; cf., *Crowder v. Kitagawa*, 81 F.3d 1480, 1483 (9th Cir. 1996) ("Congress intended to prohibit outright discrimination, as well as those forms of discrimination which deny disabled persons public services disproportionately due to their disability")

In addition, the fact that a defendant may be imposing the same requirement(s) upon all persons seeking access to certain benefits does not insulate the defendants from liability inasmuch as the disparate impact occasioned by such requirement(s) on a particular class of disabled persons is sufficient to demonstrate a violation of section 35.130(b)(3). (See *Smith-Berch, Inc. v. Baltimore County, Md.*, 68 F. Supp. 2d 602, 621-22 (D. Md. 1999) [zoning policy applicable to methadone clinics imposed "disproportionate burdens on a particular class of disabled individuals: opiate addicts who require methadone therapy to aid in their recovery."])

DISCUSSION

I. Injunctive Relief

A party seeking a preliminary injunction must demonstrate that (1) it is likely to succeed on the merits, (2) it is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in its favor, and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc*., 555 U.S. 7, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008) However, serious questions going to the merits and a hardship that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the ***Winter*** test are also met." *Alliance for the Wild Rockeies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011). Sierra On-Line, Inc., v. Phoenix softward, Inc. 739 F.2d 1415, 1421 (9th Cir. 1984 "serious question" is one on which the movant "has a fair change of success on the merits."

1. Plaintiffs are likely to succeed on the merits Because the State is Acting Without Prior Federal Approval of Its SPA, It has not Considered the Impact of the Rate Cut and Freeze Under the "Quality Of Care" or "Equal Access" Provisions of Section 30(A), and it Has not Considered or Addressed the Potential Disparate Impact Of the Rate Cuts and Freezes on Consumers Who, Because of the Nature or Severity of Their Conditions, Have Greater or Higher Needs

Plaintiffs submit that they have satisfied the first element by showing that they are seeking to enjoin the state from committing acts that have already been condemned and enjoined by both federal and state courts as violating federal law – that is, Section 30(A). (See *Exeter Memorial Hosp. Ass'n supra*, 145 F.3d 1106;Orthopaedic Hospital v. Belshe (9th Cir. 1997), 103 F.3d 1491, 1496-47; *Indep. Living Ctr. of S. Cal. v. Maxwell-Jolly*, 572 F.3d 651–53, 661-662; *California Pharmacists Association v. Maxwell-Jolly* 596 F. 3d 1098, 1109 (2010); *Independent Living Center of Southern California et al., v. Maxwell-Jolly,* 572 F.3d 644, 652) Where a state's reimbursement rate reduction fails to comply with Section 30(A) requirements, it is unlawful and subject to preemption under th Supremacy Clause of the United States Constitution. (Id.)

As recently as this past May the United States District Court for the Central District of California issued an injunction restraining the Director of the DHCS from implementing or

enforcing a rate freeze against Intermediate Care Facilities operators providing services to Medi-Cal clients. (*Developmental Services Network, et al., v. David Maxwell-Jolly,* Case No. CV 10-3284 CAS, consolidated with *California Association of Health Facilities vs. Maxwell-Jolly*) As is the case here, the state in that case sought to freeze payments to Medi-Cal providers based on budgetary considerations. The court found that subject budgetary enactment (AB4X) violated Section 30(A) because the state had not obtained federal approval of its SPA and the rate freeze violated the "equal access" and "quality of care" standards in §30(A). The court noted its decision comported with other recent decisions by California district courts in which the state was found to have committed similar violations of federal law. (*Cal. Hospital Ass'n v. Maxwell-Jolly*, Civ. No. 10-3465 FCD/EFB, 2011 WL 836706, at *19-20 (E.D. Cal. Mar. 4, 2011); *Cal. Hosp. Ass'n v. Maxwell-Jolly*, Case No. 09-CV-8642 (C.D. Cal. Feb. 24, 2010; *Cal. Ass'n of Rural Health Clinics v. Maxwelll-Jolly*, 748 F.Supp.2d 1184, 1198-1200 (E.D. Cal. 2010))

This past year California's First District Court of Appeal, applying its own independent determination of Section 30(A), concluded that the state had violated Section 30(A) by implementing a rate freeze "without considerign the impact on the statutory factors of eeficiency, economy, quality, and access to care." (*California Hospital Assn. v. Maxwell-Jolly* (2010) 188 Cal. App. 4th at 559, 574 [citing to *Forsyth v. Jones* (1997) 57 Cal.App.4th 776, for proposition that "in absence of controlling United States Supreme Court opinion," the court could make "an independent determination of federal law. . . '"]) In *dicta*, the court noted that prior federal approval of a SPA is required. (Id., at 587[4])

The state should not be permitted to disregard federal law, especially given that it has been amply instructed on the limitations of its authority under the Medicaid Act. The state cannot be heard to try to defend its actions by relying on its current fiscal crisis as the Ninth Circuit has made

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[4] The court also stated that "although CMS approval is required to obtain federal assistance, such approval, in and of itself, cannot be deemed to exempt the Department from complying with section 30(A) . . . [t]o hold otherwise would render section 30(A) to be superfluous, which established rules of statutory construction expressly disfavor." *Id.*, citing *Alianto Properties, Inc. v. City of Half Moon Bay* (2006) 142 Cal.App.4th 572, 591 [noting fundamental rule of statutory construction that court will not adopt construction rendering provision ineffective or superfluous]) ***Id.***

it clear that the state may not reduce Medi-Cal rates based only on budgetary considerations. (*See e.g., California Pharmacists Association v. Maxwell-Jolly, supra,* 596 F. 3d at 1109; *Indep. Living Ctr. of S. Cal. v. Maxwell-Jolly*, 572 F.3d at 661-662) As explained below, any budgetary consideration under the facts presented would be insufficient to justify the state's conduct.

2. Community-Based Service Providers and Consumers will Suffer Substantial Damages And Harm if Injunctive Relief is not Granted

(a) Community Vendors Will Suffer Substantial Damages and May Become Insolvent if the State Implements the Rate Cut And Freeze and Imposes the Mandatory Unpaid Holidays

As shown herein, the state's implementation and enforcement of the 4.25 percent rate cuts and freezes and the mandatory unpaid holidays will have a devastating financial impact on already impoverished community providers, which impact will potentially render an untold number of vendors insolvent. Many vendors are already operating at a loss, and some are facing mounting deficits requiring them to make substantial budget cuts, dip into cash reserves, and rely on loans to continue making services and supports available to consumers in their communities. However those vendors cannot continue to operate without making additional, substantial budget cuts that will promote the rapid deterioration of the state's service system, degrade the accessibility and quality of accessible services and supports, and most importantly place consumers at risk of harm to their health, safety and well-being of consumers for whom vendors are charged with providing quality care.

While traditionally mere economic damages were not considered irreparable inasmuch as an injured party may seek corrective relief through litigation, the facts presented are sufficient to support injunctive relief for a number of reasons. *(Sampson v. Murray*, 415 U.S. 61, 90, 94 S. Ct. 937, 39 L. Ed. 2d 166 (1974)) First, any claim by vendors for economic damage would most likely be barred by the Eleventh Amendment, which has been recognized as a means to establish irreparable harm. (See *Cal. Pharm. Assn. v. Maxwell-Jolly*, 563 F.3d 847, 852 (9th Cir. 2009)) Second, many vendors may become insolvent and have to close their doors, which will make it very

difficult to establish damages, especially given the state's chronic inadequate funding of vendors for well over a decade and the financial impact it has had on vendors over the years. Third, the fiscal steps vendors have been forced to take, including staff cuts and reductions in salaries and benefits, which will contribute to the difficulty in valuing their damages and presenting proof of them. Fourth, and finally, there is no economic value to be placed on the actual and potential harm inflicted on vendors who are being compelled by financial pressures to provide sub-standard services and supports and, in doing so, potentially place consumers at increased risk of harm.

(b) Vulnerable Consumers in Need of Services and Supports Will Suffer Immeasurable, Irreparable Harm and Will be Deprived of Important, Fundamental Rights if the State Reduces Funding to Community Providers

The substantial, irreparable harm that would be inflicted on individuals with I/DD and their families by the state's inadequate funding of vendors was foreseen by the DDS ten years ago. Specifically, the DDS accurately predicted that the state's failure to adequately maintain rates for vendors would de-stabilize and perpetuate the rapid degradation of the state's service system and jeopardize the health, safety and well-being of consumers. (Exhibit "__" to Decl. Of _____) Even ten years ago the DDS estimated that the state's failure to act would "adversely affect[] over 77,000 consumers and families." (Id.)

Notwithstanding the DDS' dire warnings concerning the consequences of the state's failure to adjust rates to better account for cost increases, the state embarked on a prolonged period of refusing to adjust vendors' rates despite spiraling costs. Then, after over seven years of frozen rates, the state decided to cut vendors' rates and impose mandatory unpaid holidays. Rather than seeking to address and remedying the threats confronting the state's service system, the state appears intent on expediting the downfall of the system by basically bankrupting the community providers responsible for directly caring for consumers.

3. The Balance of Hardships Sharply Tips in Plaintiffs' Favor And the Granting of An Injunction Is In The Public Interest.

A preliminary injunction is an extraordinary remedy and therefore, a court is obliged to "balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." (*Winter,* 129 S. Ct. at 376 (internal quotations and citations omitted)) In doing so the court must consider the equities as between the parties to the action, as well as consider whether there exists "'some critical public interest that would be injured by the grant of preliminary relief.'" ILC II, 572 F.3d at 659 (quoting Hybritech Inc. v. Abbott Labs., 849 F.2d 1446, 1458 (Fed. Cir. 1988)) In ***Orthopaedic Hospital,*** the Ninth Circuit recognized a "fundament principle" that "[i]t is not justifiable ... to reimburse providers substantially less than their costs for purely budgetary reasons. [Citations.]" (***Orthopaedic Hospital, supra*, 103 F.3d at p. 1499, fn. 3**)

Here, Plaintiffs submit that it is not even a 'close call' in terms of the interests of consumers and vendors outweighing the budget-driven considerations of the state. There is no question that the state's sole reason for cutting vendors' rates and imposing mandatory unpaid holidays is its desire to save money. However, such a reason, even when the subject enactment was passed in an emergency session called to address the fiscal emergency declared by the government, it is insufficient to counter the public's "robust public interest in safeguarding access to health care [for Medicaid recipients], whom Congress has recognized as the most needy in the county." *(Indep. Living Ctr. of S. Cal*., 572 F.3d at 659; see also *Beltran v. Meyers*, 677 F.2d 1317, 1322 (9th Cir. 1982 ["Balancing the medical or financial hardship to the plaintiffs-appellees against the financial hardship to the state resulting from its inability to recover for medical services should its rules ultimately be held valid, it was not an abuse of discretion for the district judge to find that the balance of hardships tipped sharply in favor of plaintiffs."]) The Ninth Circuit has repeatedly recognized that "state Medicaid rate reductions may not be based solely on state budgetary concerns" and that in social welfare cases a state's budgetary consideration "does not constitute a critical public interest that would be injured by the grant of preliminary relief." (*Independent Living Center, supra,* 572 F.3d 655, citing *Schweiker v. Hogan*, 457 U.S. 569, 590, 102 S.Ct 2597 (1982)).

(See e.g.,.)

Here the harm suffered by community-based vendors is such that it threatens their solvency. Vendors are having to dip into their cash reserves and rely on credit lines in order to bridge the financial gap caused by the state's gross under-funding of the vendors. After eight years of frozen rates and spiraling costs, vendors are now expected to survive reductions in funding by the 4.25 percent cut in reimbursement rates and the mandatory unpaid holidays. Vendors, particularly non-profit organizations, will hardly have any adequate remedy at law when they are forced to close their doors.

As a direct result of the damage inflicted on vendors, consumers face an even greater harm in terms of their loss of important rights afforded under both state and federal laws. Moreover, the degradation of the quality and suitability of available, accessible services and supports will significantly increase the risk of harm to the health, safety and well-being of disabled individuals to whom the Legislature expressly accepted its responsibility to service and protect inasmuch as they represented a class of individuals who were "vulnerable . . . to deprivations of their rights."(Cal. Welf. & Inst. Code section 4433(a)(2))

Plaintiffs submit that there is an overwhelming public policy supporting injunctive relief in this case. In addition to the general harm and damage inflicted on individuals with I/DD, the state's conduct threatens to disproportionately impact consumers with conditions which, by their nature and/or severity, require a greater or higher level of care. Such care, particularly where it requires additional or more skilled staff, necessarily involves higher costs that have greater financial impacts on already financially strapped vendors. The rate cuts and freezes will burden vendors with having to make additional cuts to already emaciated operating budgets. Vendors will necessarily have to begin targeting cuts in order to maintain their financial viability, and such cuts will likely have a greater, more disparate impact on services and supports that involve higher costs. This will also result in those consumers finding themselves with fewer suitable, quality programs needed to adequately meet their needs.

II. Mandamus is Appropriate to Restrain the State's Violation of Federal And State Law and to Compel the State's Compliance with the Law

Plaintiffs submit that this Court is authorized to issue a writ of mandate ordering the Directors of the DHCS and the DDS to comply with their respective duties and responsibilities under the provisions of the Medicaid Act and the Lanterman Act. Plaintiffs submit that this Court is empowered under state law to issue a writ of mandate under California Code of Civil Procedure section 1085 to enforce federal law requirements. (Code Civ. Proc., § 1085 ["Mandamus will lie to compel a public official to perform an official act required by law"]; see, *Cal. Hosp. Ass'n v. Maxwell-Jolly*, 188 Cal. App. 4th 559, 568-570 (2010))

Mandamus is available to compel the Legislature's performance where a statute requires the Legislature to act. (*Mission Hospital Regional Medical Center v. Shewry*, 168 Cal. App. 4th 460, citing to ***County of Los Angeles v. State of California*** **(1984) 153 Cal.App.3d 568, 573 [200 Cal. Rptr. 394]** [affirmed issuance of writ of mandate ordering Legislature to appropriate funds in budget to reimburse local governments for certain statutorily mandated costs]) "[T]he Legislature must not ignore the requirements of existing legislation" and, therefore, while a court cannot direct how the Legislature exercises its discretion, it can require the Legislature to comply with all laws that govern it or the subject matter on which it is legislating. (***Id***.)

Mandamus may also issue to compel an official both to exercise his discretion (if he is required by law to do so) and to exercise it under a proper interpretation of the applicable law. [Citations.]" (*Mission Hospital Regional Medical Center v. Shewry*, 168 Cal. App. 4th 460; *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 442) Even where an agency's decision is subject to its broad discretion, mandamus is not made unavailable to an aggrieved party as a matter of law. In such cases the law provides that even though "administrative actions enjoy a presumption of regularity, this presumption does not immunize agency action from effective judicial review." (*California Hotel & Motel Assn. v. Industrial Welfare Com*. (1979) 25 Cal.3d 200, 212, fns. omitted) Mandamus will lie to correct an abuse of discretion by a public official or agency. *(Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 540; *Common Cause v. Board of Supervisors*, *supra*, 49 Cal.3d at p. 442)

In ***California Hospital Assn. v. Maxwell-Jolly*, supra, 188 Cal. App. 4th at 580-81** [**"*California Hospital*"**], the court of appeal considered the very questions presented here: (1) "whether section 30(A) imposes certain duties on behalf of the Department when establishing reimbursements rates," and whether mandamus will lie to compel the state's compliance with federal law. The court answered both questions in the affirmative. The court rejected DHCS' assertion that Department's assertion that the plaintiff was trying to "control" its discretion in making rate setting decisions explaining that plaintiff was instead seeking to correct an abuse of discretion resulting from the Department's failure to consider adequately the competing goals established under Section 30(A). (*Id*. at 581) The court went on to note the plaintiff's contention that DHCS, in implementing a 20 percent exclusion and rate freeze methodologies, "failed to balance efficiency, economy, and quality of care, as well as the effect of the providers' costs on these statutory factors." (*Id*. at 581-82) In this regard the court observed that while "traditional mandamus will not lie to control the discretion of a public official or agency, that is, to force the exercise of discretion in a particular manner, ' "... [it] will lie to correct abuses of discretion, and will lie to force a particular action by the ... officer, when the law clearly establishes the petitioner's right to such action." (***Id.* at 582**, citing ***Miller Family Home, Inc. v. Department of Social Services* (1997) 57 Cal.App.4th 488, 491**)

Like the plaintiff in ***California Hospital***, Plaintiffs herein seek to constrain the defendants' discretion with respect to rate setting by compelling them to use a different methodology to establish reimbursement rates that adheres to the prescribed requirements found in both the Medicaid Act and the Lanterman Act. With regard to Section 30(A), the law is clear that the DHCS, and presumably the DDS, are duty bound to set forth "methods and procedures'" for setting reimbursement rates, it contends this provision is "infused with discretion." (Id.)

Plaintiffs have standing under state law to seek mandamus in this case because they qualify as beneficially interested party inasmuch as they have "special interest over and above the interest of the public at large." (***California Assn., supra*, 148 Cal.App.4th at p. 706**) Courts have held that "the beneficial interest standard" is to be broadly applied. "[W]here a public right is involved, and the object of the writ of mandate is to procure enforcement of a public duty, a citizen is beneficially

interested within the meaning of Code of Civil Procedure section 1086 if he is interested in having the public duty enforced." (***Mission Hospital, supra*, 168 Cal.App.4th at p. 480**; internal quotations and citations omitted) In fact, the standard is applied so broadly that a party may be entitled to enforce the subject act by means of a writ of mandate under section 1085 "even though the party may lack standing to enforce the Medicaid Act under section 1983 of title 42 of the United States Code." (Id.) As explained by one state court, while section 1983 requires violation of a private right, privilege, or immunity to confer standing, section 1085 creates a broad right to issuance of a writ of mandate "to compel performance of an act which the law specifically enjoins." (***Mission Hospital, supra***, 168 Cal.App.4th at p. 480) Stated differently, section 1085 "is available not only to those who have enforceable private rights, but to those who are 'beneficially interested' parties within the meaning of Code of Civil Procedure section 1086." (Id.; internal quotations and citations omitted)

CONCLUSION

Dated: August ___. 2011

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By _____
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