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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO/OAKLAND DIVISION

V.L., *et al.*, Plaintiffs v. WAGNER, *et al.*, Defendants	Case No.: CV 09-04668 JSW **NOTICE OF MOTION AND MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** DATE: October 16, 2009 TIME: 9:00 a.m. PLACE: Courtroom 11, 19th Floor

NOTICE OF MOTION AND MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

TO DEFENDANTS DIRECTOR JOHN WAGNER, THE CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, DIRECTOR DAVID MAXWELL-JOLLY, THE CALIFORNIA DEPARTMENT OF HEALTHCARE SERVICES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 16, 2009 at 9:00 a.m. or as soon thereafter as counsel may be heard in Courtroom 11, 19th Floor, United States District Court, Northern District of California, located at 450 Golden Gate Avenue, San Francisco, CA, Plaintiffs individually and on behalf of class members will move the Court pursuant to Rule 65 of the Federal Rules of Civil Procedure and Rule 65-1 of the Civil Local Rules for a temporary restraining order and/or preliminary injunction enjoining Defendants and their successors, agents, officers, servants, employees, attorneys and representatives and all persons acting in concert or participating with them, from implementing the provisions of ABX4 4 that amended Sections 12309(e) and 12309.2 of the California Welfare and Institutions Code to terminate from eligibility for IHSS services those recipients with Functional Index Scores of less than 2.0 and to eliminate domestic and related services for recipients with functional ranks of less than 4 for those services.

The Motion will be made on the ground that Plaintiffs and class members will suffer irreparable injury unless the activities described above are enjoined, and that the activities described above violate the Medicaid Act, the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and the Due Process Clause of the United States Constitution. Plaintiffs are concurrently filing a motion for class certification, and further move that the injunction issue on a class-wide basis.

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INTRODUCTION

This suit challenges the legality of two provisions in ABX4 4, which, for purely budgetary reasons, terminate and reduce services to more than 130,000 elderly, blind, or disabled individuals who rely on the In-Home Supportive Services ("IHSS") program to remain safely in their homes. Each of these over 135,000 IHSS recipients has been determined by county social workers to need the services he or she currently receives in order to avoid the risk of injury or other harm. Yet ABX4 4 terminates or reduces IHSS services to these elderly or disabled recipients based on measures called functional ranks and composite Functional Index ("FI") Scores – numbers that do not measure such risk of harm, were not intended to determine eligibility, and have never previously been sent to IHSS recipients. As county officials attest, FI Scores were not designed to measure need or eligibility and should not be used for such purposes. Collins Decl. ¶27 (counties "do not use the composite FI scores for any reason."); Crockett Decl. ¶¶8, 14 ("never intended to be used as an eligibility criterion"); Kaljian Decl. ¶5 ("[p]roblems" with using FI Score as eligibility standard); Calame Decl. ¶6 ("completely arbitrary") Golledge Decl. ¶6 (use of FI Score and functional ranks for eligibility determinations "misguided"); Figueroa Decl. ¶8 (does nto use to determine services needed).

Defendants have announced plans to send notices of termination and reduction of IHSS services under ABX4 4 to class members on or before October 19, 2009, with an effective date of November 1, 2009. Plaintiffs seek a TRO and/or preliminary injunction of the planned IHSS terminations and reductions which, unless enjoined, will cause immediate and irreparable harm by placing members of the plaintiff class at imminent and serious risk of harm to their health and safety, as well as of unnecessary and unwanted out-of-home placement including institutionalization. The balance of equities strongly favors Plaintiffs because Defendants' only interest is fiscal, whereas the plaintiff class faces life or death consequences.

Plaintiffs are highly likely to prevail on their legal claims. Defendants' failure to provide adequate notice of the terminations and reductions violates the federal Due Process Clause. ABX4

4 also contravenes federal law by terminating necessary health care services based on arbitrary numbers that do not meaningfully distinguish among individuals on the basis of need, and that discriminate against recipients with mental disabilities. Thus, ABX4 4 violates the requirements of Title XIX of the Social Security Act, 42 U.S.C. § 1396a ("the Medicaid Act") that States provide (1) comparable Medicaid services to individuals with similar needs; (2) services according to reasonable standards; and (3) services that are sufficient in amount, duration, and scope to reasonably achieve their purposes. And it violates the Americans with Disabilities Act of 1990, 42 U.S.C. § 12312 ("ADA"), and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"), by placing IHSS recipients at imminent risk of unnecessary and unwanted out-of-home placement, including in institutions such as nursing homes and psychiatric facilities; by discriminating on the basis of type of disability; and by using methods of administration that will exclude individuals with disabilities from IHSS.

BACKGROUND

I. The IHSS Program Provides Necessary Services To Keep Elderly and Disabled People Safely At Home.

A. IHSS provides Core Services that Recipients Need to Remain Safely at Home.

IHSS is a program provided through California's Medicaid program ("Medi-Cal") and is funded with a combination of state, county and federal Medicaid funds. Welf. & Inst. Code § 12306. The purpose of the program is "to enable [the] aged, blind or disabled poor to avoid institutionalization by remaining in their homes with proper supportive services." *Miller v. Woods,* 148 Cal.App.3d 862, 867 (1983); *see also* Welf. & Inst. Code § 12300(a) (IHSS provides services to those who "cannot safely remain in their homes . . . unless these services are provided"); *id.* § 14132.95(a) (similar); Cal. Dep't Soc. Servs. ("CDSS"), Manual of Policies and Procedures ("MPP") § 30-700.1 (similar). [1]

The IHSS program has been remarkably successful in stabilizing elderly and disabled Medi-

[1] For the Court's convenience, that portion of the CDSS Manual containing the regulations applicable to IHSS is attached to Plaintiffs' Request for Judicial Notice ("RJN") as Exhibit H.

Cal recipients at home.[2] For example, 81-year-old Plaintiff Beatrice Sheppard struggles with the effects of a stroke that left her unable to walk, cook, shop, clean house, go to the doctor, or bathe without assistance. Sheppard Decl., *passim*. She "want[s] to do things for [her]self but … know[s] there is a chance that [she] will lose [her] balance and fall" and so is "very cautious about what [she] tr[ies] to do." *Id.* ¶3. She is able to remain in the small apartment where she has lived for 11 years only because her IHSS provider assists her with shopping, meal preparation and clean-up, housecleaning, accompaniment to medical appointments, and bathing. She receives just 41.7 hours of IHSS per month, but these services are critical to enabling her to remain safely at home. *Id.* ¶5.

Of the more than 425,000 people who depend on the IHSS program, 60% are seniors such as Plaintiff Sheppard.[3] Experts and county IHSS officials confirm that these seniors are healthier and happier living at home. *See*, *e.g.*, Altman Decl. ¶4; Castro Decl. ¶8; Gardner Decl. ¶39; Hathaway Decl. ¶14; LaPlante Decl. ¶7; Navarro Decl. ¶13; Schnelle ¶¶ 5,6. Similarly, people under 65 with disabilities have better outcomes and experience more independence and well-being living independently.[4]

Assistance with personal care tasks such as bathing, dressing, and using the toilet are core IHSS tasks. For example, Plaintiff V.L. is a 14-year-old boy with muscular dystrophy who cannot stand for more than a few minutes and needs assistance using the toilet, showering and dressing. Lagahid Decl. ¶2. IHSS is crucial for this family, since V.L.'s mother has the same neuromuscular

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[2] IHSS services include (1) domestic services (house cleaning); (2) related services - meal preparation and clean-up, restaurant meal allowance, laundry, grocery shopping and other shopping; (3) personal care services - bowel and bladder care, respiration, feeding, routine bed baths, bathing, oral hygiene and grooming, dressing, repositioning and rubbing skin including range of motion exercises, transfers, care and assistance with prosthetic devices and self-administration of medication, routine menstrual care, skin care, ambulation; (4) travel to medical appointments; (5) yard hazard abatement; (6) protective supervision; (7) teaching and demonstration services, and (9) paramedical services. Welf. & Inst. Code § 12300(b) & (c); *Id.* § 14132.95(d)(1) & (2).

[3] IHSS Background and Caseload Components, Kline Decl., Ex. C at 8. *See also* Goldberg Decl. ¶¶ 2, 8; Hoffacker Decl. ¶3; Guerra Decl. ¶¶12, 14; Crockett Decl. ¶ 3 (many recipients over 80 being terminated); Collins Decl. ¶ 30 (91-year old woman losing domestic and related services).

[4] *See, e.g.,* Oster ¶7 ("healthiest" in his own home); Hathaway Decl. ¶14 (director of county IHSS program; "people will live longer, be happier and . . . their quality of life will be increased" if they remain at home); Leiva Decl. ¶7; Rivera Decl. ¶¶ 16, 36.

disorder that has disabled V.L. *Id.* ¶11. Like many recipients with arthritis or the symptoms of a stroke, Plaintiff Sheppard depends on her IHSS provider for assistance taking a bath; without this help she would not be able to bathe at all. Sheppard Decl. ¶10. Other IHSS recipients need personal care assistance because, for example, they are paralyzed, Bean Decl. ¶¶2, 7, 9, have traumatic brain injury, F.H. Decl. ¶2, or have seizure disorders, Crockett Decl. ¶17.

Many IHSS recipients need assistance with simple domestic chores such as cooking. Addison Decl. ¶2; Campbell Decl. ¶6; F.H. Decl. ¶11; Jones Decl. ¶8; Mandell Decl. ¶9; Oster Decl. ¶2; Wilson Decl. ¶13; Worden Decl. ¶6. When balance is poor, help with cooking and meal clean-up ensures that individuals do not risk a fall, which can trigger a "downward spiral" that ends in a nursing home. Kaljian Decl. ¶16. Other IHSS recipients need assistance with meal preparation because they have dementia or cognitive impairments. Aho Decl. ¶11; Baran Decl. ¶25; Crockett Decl. ¶16; Jansen Decl. ¶¶2, 5; Oster Decl. ¶2. Whatever the reason, IHSS services ensure their safety, continued health, and nutrition. *See., e.g.*. Baran Decl. ¶25 (regular, nutritious meals slow dementia process and make individuals more alert); Gardner Decl. ¶31; Nicco Decl. ¶35. Other recipients need help with special diets because of suppressed immune systems, Campbell Decl. ¶5; Jones Decl. ¶ 8, or because they are dialysis patients, Collins Decl. ¶23.

Many elders and people with disabilities can no longer go out into the community on their own. Sheppard Decl. ¶6; Anderson Decl. ¶7; Guerra Decl. ¶13; Hoffacker Decl. ¶4. They rely on another core IHSS service, which is assistance with shopping, errands, and accompaniment to medical appointments. Addison Decl. ¶5; Anderson Decl. ¶4; Bean Decl. ¶7; Good Decl. ¶4; Hoffacker Decl. ¶4; Hylton Decl. ¶ 5; Mandell Decl. ¶6; Oeland Decl. ¶5; Reeder Decl. ¶5; Wilson Decl. ¶13. Even IHSS recipients like Plaintiffs Sheppard and Oster who can warm up their own food still need someone to buy food for them or prepare meals to eat later. Sheppard Decl. ¶9; Oster Decl. ¶2. Plaintiffs and others like them also need IHSS assistance to visit their doctors. Sheppard Decl. ¶6; Anderson Decl. ¶7; Canann Decl. ¶4; Brent Decl. ¶4. The amount of time that IHSS allows for these tasks is small – no more than 90 minutes per week – but critical to recipients.

IHSS recipients may also need help with cleaning and laundry. Those with poor balance and weakness often cannot manage a broom or mop and risk falls if they attempt to clean house

themselves. Sheppard Decl. ¶7; Anderson Decl. ¶5; Bean Decl. ¶¶9, 10; Collins Decl. ¶29; Good Decl. ¶5; F.H. Decl. ¶10; Hylton Decl. ¶5; Mandell Decl. ¶7; Oeland Decl. ¶6. Blind people need similar assistance. Kaljian Decl. ¶12; Anderson Decl. ¶5. Others have mental disabilities and need direction and reminders to clean because of their level of confusion, disorientation, or self-neglect. Aho Decl. ¶16; Oster Decl. ¶¶8, 9. Cleaning services are vital to allow individuals to stay safely in their home, particularly those with suppressed immune systems, Jones Decl. ¶14; Campbell Decl. ¶4, respiratory ailments, Collins Decl. ¶29, or obsessive compulsive disorders, Nicco Decl. ¶26. As with shopping, the allowable hours and cost to the IHSS program are small—only six hours per month—in relation to the benefit to recipients. MPP § 30-757.135.

IHSS providers also offer support and prompting to remind recipients to take prescription medication at the right time and in the right amounts. McHenry Decl. ¶4 (recipient took either too much or too little medication in absence of provider); Leon Decl. ¶4; Medina Decl. ¶6; Nicco Decl. ¶33; Oster Decl. ¶4; Reeder Decl. ¶4; Baran Decl. ¶21. Often this crucial service does not require much extra time because providers give these prompts while performing other tasks such as laundry and cooking. Baran Decl. ¶23; Castro Decl. ¶10; Medina Decl. ¶6; Nicco Decl. ¶23.

For frail seniors and people with mental disabilities who lack family supports and may otherwise be very isolated, the presence of an IHSS provider monitors deterioration or changes in condition that may otherwise go unnoticed until it is too late. Castro Decl. ¶9; Nicco Decl. ¶23; Kaljian Decl. ¶16. IHSS providers who see a problem developing can intervene or obtain help.

B. Recipients are Individually Assessed To Receive IHSS Services.

IHSS is administered by counties under the supervision of Defendant CDSS and pursuant to an interagency agreement between Defendant Department of Health Care Services ("DHCS") and CDSS. County social workers conduct an individualized, in person assessment of applicants' eligibility for IHSS services and the amount of services that they need to remain safely in their own home. Welf. & Inst. Code §§ 12300(g), 12302.1, 14132.95(f), 14132.951(b) & (e); MPP §§ 30-761.11-.13, §30-761.24; *Miller*, 148 Cal.App.3d at 868; Figueroa Decl. ¶4. Regulations dictate that "[s]ervices shall be authorized only [where] Social services staff . . . has determined that the

recipient would not be able to remain safely in his/her own home without IHSS [and] [p]erformance of the service by the recipient would constitute such a threat to his/her health/safety that he/she would be unable to remain in his/her own home." MPP § 30-761.1.

California statutes require that counties determine a person's eligibility (need) for any services by assessing "the recipient's living environment, alternate resources, and their functional abilities." Welf. & Inst. Code § 12309 (a)-(b). While the State has promulgated "hourly task guidelines" as an aid in the assessment process, counties are required to authorize hours outside the guidelines ranges when necessary to meet individual need. Welf. & Inst. Code § 12301.2(a)-(c); Figueroa Decl. ¶6. It is "very necessary to conduct individualized assessment." Crockett Decl. ¶¶4-6; *accord* Collins Decl. ¶11; Nicco Decl. ¶12.

C. IHSS is Cost Effective.

IHSS is extremely cost effective, given the comparative costs of out-of-home care. Nursing homes, for example, cost five times as much as services received by a typical IHSS recipient.[5] Most IHSS recipients need only a few hours of assistance per day or week.[6] However, this assistance makes all the difference in a recipient's ability to live safely at home. Kaljian Decl. ¶10; Nicco Decl. ¶41; Oster Decl. ¶2; Sheppard Decl. ¶12. Without IHSS, many recipients would end up needing to seek more expensive services in emergency rooms and other settings. Gardner Decl. ¶ 38; Kaljian Decl. ¶16-17; Collins Decl. ¶32, 34-35; Nicco Decl. ¶36, 40.[7]

Because of its many benefits, Defendants have described IHSS as "an essential component

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[5] "California's IHSS Program: Who is Served?" Kline Decl., Ex. G at 7. This report compares the average daily rate for hospitals ($1230), ICF/DD facility ($142), nursing home ($118) and IHSS ($24). *See also* Jimenez Decl. ¶¶3, 6; Polit Decl. ¶¶4, 5.

[6] IHSS: Background and Caseload Components, Kline Decl., Ex. C at 7: Half of all IHSS recipients receive fewer than 80 hours per month. The maximum number of IHSS hours is 283 per month, but only 6% of recipients receive services in this hourly range. *Id.*

[7] This cost effectiveness is well illustrated by Plaintiffs. Plaintiff Sheppard's IHSS provider works 41.7 hours per month (Sheppard Decl. ¶5) and at $11.50 per hour her wages are less than $500 per month. In contrast, a nursing home costs over $4000 per month. *See supra* n. 5. David Oster is able to live safely in the community with only 63.2 monthly IHSS hours (Oster Decl. ¶1), for which his provider earns $568. When the threat to his IHSS precipitated a mental breakdown and he ended up in a psychiatric hospital for two weeks at over $1000 per day, the total cost exceeded $15,000.

of the State's effort to provide services to maintain individuals [with disabilities] in their homes and communities."[8] One year ago, Governor Schwarzenegger declared:

> [C]ommunity-based care and services can be more cost-effective than institutional care and result in a higher quality of life that promotes the values of community participation, inclusiveness, and respect for diversity. . . . California has a demonstrated record of success in providing services that support the full integration of persons with disabilities in community life through such programs as In-Home Supportive Services.

Gov. Schwarzenegger's Executive Order 5-19-08, Kline Decl., Ex. H.

II. New State Budget Act Provisions Will Cut IHSS Services Based on Functional Index Rankings and Scores That Do Not Reflect Recipients' Ability to Live Safely at Home.

A. ABX4 4 Eliminates IHSS Services For Tens of Thousands of Recipients.

Governor Schwarzenegger signed ABX4 4 on July 28, 2009. ABX4 4 amended California Welfare and Institutions Code Section 12309(e) and added Section 12309.2, to terminate from IHSS all recipients with overall composite FI Scores below 2.0 and to eliminate domestic and related services for IHSS recipients with functional ranks below 4. Stats. 2009, c. 4, §§ 29, 30 (Part II). There are four functional ranks in the domestic and related services categories: 1) Housekeeping; 2) Laundry; 3) Meal Preparation and Clean-up; and 4) Shopping and Errands. CDSS estimates that 36,000 Californians will lose all IHSS services, and 97,000 will lose domestic and related services, as a result of ABX4 4. CDSS Press Release, Kline Decl., Ex. F. These cuts will affect 133,000 people – almost one in every three IHSS recipients.

State officials claim that ABX4 4 limits IHSS eligibility to the "most severely disabled" and cuts services to the "least disabled." LAO's CA July 2009 Budget Package, Kline Decl., Ex. J at 7. This is not true. As described by the most senior social services director in the State of California:[9]

> [T]o the extent that the Legislature intended to cut IHSS services in accordance with need, ABX4 4 does not do that. First, all IHSS recipients by definition need the services that they are authorized to receive in order to remain safely in their homes; they would not have been authorized to receive those services if they did not need

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[8] CA Health and Human Services Agency, CA Olmstead Plan, Kline Decl., Ex. I at 32, 52 (commitment to increase service capacity for "in-home care").

[9] Leland Collins is Director of the Social Services Department for San Luis Obispo County. He has over 25 years of experience as a director of county social services. Collins Decl. ¶1.

> them. Moreover, because of the way the functional rank and composite FI score are calculated, they are not an accurate indicator of need, and these cuts do not necessarily reduce or eliminate IHSS services for the least needy. Instead, many comparably needy individuals are being treated differently because of the vagaries of the scoring system.

Collins Decl., ¶ 10; *see also* Nicco Decl. ¶11 (FI Scores and functional ranks "not good measures"); Golledge Decl. ¶¶7, 9; *supra* at 1. As described below, ABX4 4 terminates and reduces IHSS services on the basis of these arbitrary numbers that have never previously been considered a proxy for IHSS eligibility, the amount of services needed, or the risk of injury without services.

B. The Functional Ranks Are Not An Accurate Predictor of Severity of Disability or Whether Recipients Will be Safe without Assistance.

The functional ranks that are used to eliminate eligibility for domestic and related services for some individuals, and to calculate the composite FI Score used to terminate services for others, were never designed for such a purpose. The functional ranks correspond to five levels for each activity of daily living ("ADL"):

- Rank 1 for those with independent functioning who do not need assistance;
- Rank 2 for those who "needs verbal assistance, such as reminding, guidance, or encouragement";
- Rank 3 for those who need "some human assistance";
- Rank 4 for those who need "substantial human assistance"; and
- Rank 5 for those who cannot physically perform the function at all.

Welf. & Inst. Code § 12309(d).

A recipient must rank at least 2 in any activity to need the corresponding IHSS service (MPP § 30-763.1), but otherwise, until now, functional rank has had no direct correlation to eligibility for IHSS or the number of IHSS hours authorized. *See*, *e.g.*, MPP § 30-757.1(a)(1) (functional ranks cannot be "sole factor" to determine eligibility or hours); Figueroa Decl. ¶8. The functional ranks were not intended to signify that a recipient with a 2 or 3 for a given task had less need for assistance than someone with a 4. By definition, any recipient with a rank of 2 or above cannot perform the function safely without assistance. Welf & Inst. Code § 12309(d); MPP § 30-761.1; Crockett Decl. ¶9. Indeed, for every service with hourly task guidelines, the standard time

range is so broad that it overlaps for functional ranks 2 through 5. Collins Decl. ¶15.[10] Until now, social workers have used the functional ranks and hourly task guidelines only as a form of documentation, and authorized hours based on a careful, individualized assessment of need. Crockett Decl. ¶7, 12-13; Collins Decl. ¶11, 15. Under ABX4 4, however, these functional ranks mean the difference between receiving or not receiving services.

There are "many grey areas [s] and it is impossible to place someone in a given functional rank with mathematical precision." Collins Decl. ¶12. Researchers note that "whether provider assistance is verbal (rank 2) or physical (3) their presence during task performance is necessary and therefore the practical distinction between the two ranks is elusive." Kline Decl., Ex. D at 14. Similarly, "[I]t is very difficult to discern the difference between" ranks 3 ("some assistance") and 4 ("substantial assistance"). Collins Decl. ¶13 (highlighting similarity in CDSS descriptions of ranks 3 and 4 for domestic services); Nicco Decl. ¶ 17. For example, recipients are to be ranked 3 in meal preparation if they need assistance on a less than daily basis (because they can reheat leftover food in a microwave) and 4 if they need assistance on a daily basis. All County Letter ("ACL") No. 06-34, RJN Ex. C, Ex. B at 7. Under ABX4 4, however, a person with a rank of 3 will get *no* assistance, and will not have any leftover food to heat up. Crockett Decl. ¶11.

The functional ranks are a particularly poor measure of eligibility for individuals with mental impairments. National expert Dr. William Gardner explains that individuals with cognitive and psychiatric disabilities frequently require verbal rather than physical assistance, and so may receive a functional rank of 2 rather than 3 or 4 for some activities. Gardner Decl. ¶¶20-24; *accord* Nicco Decl. ¶¶21-22; Hathaway Decl. ¶15; Foss Decl. ¶6; Collins Decl. ¶19; Crockett Decl. ¶9-10. Prior to the adoption of ABX4 4, CDSS trained social workers to give equal recognition to the needs of IHSS recipients with cognitive and psychological disabilities, instructing: "If a depressed client, for example, sits passively in the dark living room all day, his need is as real and measurable

[10] For example, a recipient may rank either 2, 3, or 4 in meal preparation and receive 3-7 hours per week for this service under the standard hourly task guideline. MPP § 30-757.131(a). Thus, a recipient with a rank of 2 could receive seven hours while a recipient with a rank of 4 receives only five hours, depending on the social worker's individual assessment of need.

as the client whose immobility is caused by a spinal cord injury. If the client will perform the given activity when reminded or encouraged, the appropriate ranking is a 2." ACL 88-118, RJN, Ex. G at 6; *see also* Kline Decl., Ex. A at 49-85. Assigning a functional rank of 2 to recipients with mental disabilities reflects the nature of the assistance needed, not the severity of need or whether IHSS would be authorized.

Treating the functional ranks as a hierarchal order, with a 2 signifying less need for services than a 3, 4, or 5, incorrectly presumes that verbal assistance, cueing or encouragement to help a person perform an activity of daily living is less essential to health and safety than the provision of physical assistance for an individual with a physical impairment. This ignores the fact that if a person with a mental or cognitive disability does not have the verbal assistance of his or her IHSS provider, the risk to his or her health and safety can be the same as for a person who needs physical assistance to do these same activities. Gardner Decl. ¶21; Nicco Decl. ¶24. People with mental disabilities may need verbal cueing or other nonphysical assistance for a variety of reasons that are critical. For example, many people need reminders to eat on a regular basis or to eat appropriate foods, assistance to avoid eating excessive amounts of food, or reminders not to eat food that is contraindicated because of their medical conditions. Gardner Decl. ¶¶30-33. An IHSS Program manager explains:

> Often all that someone with a cognitive or psychiatric disability needs in order to maintain a safe and independent living situation is someone who can come by every morning to encourage or remind them to get out of bed, bathe, get dressed, take medication, and have breakfast. . . . with no IHSS provider visiting regularly . . . [a]person's environment and ability to live safely in the community can fall apart in a matter of days, potentially leading to an exacerbated medical condition, hospitalization, institutionalization, homelessness and/or death.

Nicco Decl. ¶23.

C. The Composite Functional Index Score Is Calculated By A Weighted Formula That Does Not Reflect the Critical Nature of Certain Services and Results in Low Scores for Certain Groups of Recipients, Including Children and People with Mental Disabilities.

The composite FI Score is even more disconnected from the actual IHSS assessment process than are the functional ranks. When the FI Score was first initiated as a method of quality assurance the State recognized that neither the individual functional ranks nor the overall FI Score

"predict hours" that are "appropriate." ACL 88-118 Q13, RJN, Ex. G at 4. CDSS itself has tested the FI Score and determined that it is "not meaningful." Kline Decl., Ex. E. But under ABX4 4, anyone with an FI Score below 2.0 will be terminated from all IHSS services.

The FI Score is a number between 1.00 and 5.00 that is calculated by the state's computer system according to a complex mathematical formula that factors in the weighted average of the functional ranks for each of the 11 physical task ADL's. ACL 88-118 Qs 9-10, RJN, Ex. G at 3-4; ACL 09-56 RJN, Ex. A at 2. It was originally designed in the 1980s as part of a "uniformity system" for quality control purposes. ACIN No. E-61-89, RJN, Ex. F. Until ABX4 4, the counties administering the IHSS program did not use the FI Score for any purpose, including quality control. Collins Decl. ¶27; Nicco Decl. ¶20; Crockett Decl. ¶14. Thus, neither state nor county staff has had any incentive to review FI Scores for accuracy, or alignment with actual need. Collins Decl. ¶27. Notices of action to IHSS recipients have never included the FI Score or its component functional ranks, and so recipients have never had the opportunity to challenge the accuracy of these measures.[11] ACL 09-56, RJN, Ex. A at 7. The very first time that most recipients hear about their functional ranks and FI Scores will be the new notice of action that CDSS plans to send out ten days before IHSS benefits are cut.[12]

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[11] *See* Baran Decl. ¶10 ("Although our clients would appeal or ask for a reassessment if they were not getting enough IHSS hours, they would not know to appeal or ask for a reassessment of their functional index ranks and scores."); Bean Decl. ¶6 (after requesting functional ranks, found that FI Score listed by county was different from that listed on state system). Once they have learned their FI Scores, some IHSS recipients have found that their county social workers rapidly acknowledged that the component functional ranks were incorrect and increased them. Hylton Decl. ¶7; Brown Decl. ¶¶4-6. This informal reassessment process might have resolved many problems with functional ranks if CDSS had notified recipients of their functional ranks and FI Scores earlier, but it takes time. Sending the functional ranks and FI scores out on the eve of the termination and reductions, as CDSS plans to do, will not allow enough time for informal reassessment to avert an interruption in IHSS.

[12] Most IHSS recipients have not heard of their FI Scores and are unsure how to obtain this information. *E.g.,* F.H. Decl. ¶3 ("I don't know my functional index score because it doesn't say it on my notice"); Sheppard Decl. ¶13 ("I have never heard of a functional index or functional rankings and I have no idea what these mean…I don't even know who my county IHSS social worker is, so I don't have an easy way to find out whether I will be cut or not"). Recipients have encountered tremendous difficulty in contacting their social workers to find out their FI Scores and whether they are at risk of having their services cut or reduced. *See e.g.*, Marshall Decl. ¶4

There are numerous reasons why the FI Score does not accurately reflect whether an individual can safely perform activities without IHSS assistance: First, as described above, the functional ranks themselves do not signify that someone with a rank of 2 or 3 can perform the task safely without assistance, any more than someone with a higher rank.

Importantly, the FI Score reflects the *average* of 11 different functions. "Looking at the average functional ranking across a wide spectrum of tasks fails to take into account criticality." Collins Decl. ¶17. That is, if a recipient needs assistance with only some activities, that recipient will tend to have a low FI Score, and will be cut off from all services, including those that may be critical in allowing that recipient to live safely and independently at home. Crockett Decl. ¶¶15-17 (clients with seizure disorders only need assistance with bathing and cooking which would be dangerous for them to perform themselves); Kaljian Decl. ¶ 12 (blind recipient needs assistance traveling to medical appointments and cleaning dishes and apartment); Golledge Decl. ¶ 8 ("does not make any sense" to terminate recipients who need assistance bathing and using the toilet "because their ability to perform other tasks lowers their" FI Score). Moreover, the FI Score does not factor in at all some tasks that are crucial for certain recipients, such as medication reminders and travel to medical appointments. MPP § 30-757.14(g)(i); Kaljian Decl. ¶ 8; Nicco Decl. ¶25**.**

Additionally, the weights used have no external validity. They were determined based on the average hours assigned for those tasks by counties in 1988. ACL 88-118, Q11, RJN, Ex. G. The weights have not changed since, despite changes in the IHSS population and corresponding changes in need. Collins Decl. ¶16. Moreover, in 1988 counties varied widely in their authorization of IHSS hours, so that the weights derived from those hours "may already reflect inconsistent assignment of hours." ACL 06-34E2, Kline Decl., Ex. D at 8; Collins Decl. ¶16.

The FI Score is especially not correlated to the needs of children, who will be terminated at high rates. Collins Decl. ¶7 (36% of children in county will be terminated compared to 25% of

("[M]ost consumers I spoke with were unable to get their scores…several have reached their service workers but been unable to get their scores, and several more have been unable to reach their service worker at all, despite repeated attempts"). Even law firms representing plaintiffs have been unable to obtain FI Scores and functional ranks for many of their clients. *See e.g.* Kline Decl. ¶4; Marshall Decl. ¶8; Taggares Decl. ¶8.

adults); Nicco Decl. ¶¶8-9 (23% of children in county will be terminated compared to 8% of adults). The problem is the way functional ranks are averaged into the score:

> Because children are not expected to perform domestic or related functions (disabled or not) or even certain personal care activities (depending on age), they receive a "1" for all of these activities. . . . Because the FI [Score] is an average number that includes services that children do not receive, the children all receive disproportionately low scores.

Collins Decl. ¶21; *see also* ACL 88-118, RJN, Ex. G at 6. Consequently, children such as V.L. who have high needs and high scores for bathing, dressing, and toileting still receive a relatively low composite FI Score, and will be terminated from the IHSS program. Lagahid Decl. ¶6; *see also* Collins Decl. ¶25 (9 year old with multiple severe disabilities and FI Score of 1.82); Nicco Decl. ¶¶21, 31 (child with brain tumor and FI Score below 2).

The FI Score is also a particularly inaccurate measure for individuals with mental impairments, who are disproportionately likely to have an FI Score below 2.0 and lose eligibility for all IHSS. Baran Decl. ¶13-16; Collins Decl. ¶19; Nicco Decl. ¶21. As described earlier, individuals with mental impairments tend to receive lower functional ranks than those with physical disabilities, which drives down their FI Scores. *See supra* at 9-10. Moreover, the FI Score does not include the functional ranks assigned by social workers for memory, judgment, and orientation. MPP 30-756.372. This may artificially depress FI Scores for recipients with mental disabilities. Gardner Decl. ¶24; Nicco Decl. ¶¶22, 33; Collins Decl. ¶19; Kaljian Decl. ¶9. Similarly, many individuals with mental disabilities will need only a few critical services, such as medication management and assistance with domestic and related tasks, and will not need help with personal care functions as bowel/bladder, ambulation, or respiration. Because the FI Score is a weighted average, persons who need only a few services receive disproportionately low scores.[13]

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[13] For example, many IHSS recipients have psychiatric disabilities relating to hoarding and cluttering. Because they do not need personal care services, and often receive only one-time heavy cleaning and ongoing domestic assistance, they tend to have low FI Scores, and may lose their IHSS, be evicted and become homeless. Nicco Decl. ¶26; Syropiatko Decl. ¶6; Guerra Decl. ¶12; Baran decl. ¶14. Plaintiff Oster has a FI Score of below 2.0 even though he has a rank of 5 for housework, laundry, and shopping errands, and a rank of 3 in meal preparation. This is because he does not have high functional ranks in other areas, such as eating or bowel and bladder care. Oster Decl. ¶11.

LEGAL STANDARD

"A plaintiff seeking a preliminary injunction must establish that he is [1] likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter v. Natural Res. Def. Council Inc.*, 129 U.S. 365, 374 (2008)); *Stormans, Inc. v. Selecky*, 571 F.3d 960, 978 (9th Cir. 2009). Requests for preliminary injunctive relief are evaluated on a sliding scale – where plaintiffs have made a strong showing of irreparable harm, they need not make as great a showing with respect to likelihood of success on the merits, and vice versa. *See*, *e.g.*, *Martinez v. Schwarzenegger*, 2009 WL 1844989, at *3, *5-*6 (N.D. Cal. June 26, 2009); *Habeas Corpus Res. Ctr. v. United States Dep't. of Justice*, 2009 WL 185423, at *5, *9 (N.D. Cal. Jan. 20, 2009). Plaintiffs meet this test, as here there is both severe irreparable harm and a strong likelihood of success on the merits.[14]

ARGUMENT

I. The Termination of IHSS Services Will Cause Irreparable Injury, and the Equities and Public Interest Weigh in Favor of a Status Quo Preliminary Injunction.

The loss of IHSS services will put Plaintiffs at imminent risk of illness, injury, institutionalization, and even death, as well as harm to their family ties, independence and dignity. An injunction should issue to preserve the status quo while the merits of the legal challenge are adjudicated.

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[14] Although plaintiffs are concurrently filing a motion for class certification in an abundance of caution, "[d]istrict courts are empowered to grant preliminary injunctions regardless of whether the class has been certified." *Brantley v. Maxwell-Jolly*, __ F.Supp.2d __, 2009 WL 2941519, at *14 n.14 (N.D. Cal. Sept. 10, 2009) (quotation marks omitted). Class certification is unnecessary when, as here, granting relief to any class member will effectively grant relief to the entire class. *See* 2 Newberg on Class Actions, § 9:45, at 411 n.3 & 413-14 (4th ed. 2002) (interim injunctive relief should be awarded on class-wide basis where "activities . . . are directed generally against a class of persons"; collecting cases ordering class-wide preliminary injunctive relief pending class certification); *cf. Joyce v. City & County of San Francisco*, 846 F.Supp.2d 843, 853-54 (N.D. Cal. 1994) (considering injuries to all individuals within class when class determination not yet made). However, if this Court disagrees, it should certify the classes for the reasons set forth in Plaintiffs' Motion for Class Certification.

A. The Termination of IHSS Services Will Place Recipients at Great Risk of Injury at Home, Homelessness and Institutionalization.

1. Risk of Injury and Effect on Health and Safety

The irreparable injury resulting from the loss of IHSS services will be severe. Counselors who work with IHSS recipients predict a "humanitarian crisis," Baran Decl. ¶19, and premature deaths, Goldberg Decl. ¶¶6-7. Some who lose their IHSS may neglect to take their medications or take them improperly, compromising their health. Baran Decl. ¶¶20-21; Crockett Decl. ¶¶16-17; Reeder Decl. ¶6; Kaljian Decl. ¶7; Medina Decl. ¶6; Leon Decl. ¶4; Castro Decl. ¶10; Nicco Decl. ¶24; Hoffacker Decl. ¶6; McHenry Decl. ¶4. Others will be unable to leave the house to obtain food, medication, and other necessities. Guerra Decl. ¶13; Collins Decl. ¶28; Hathaway Decl. ¶13; Mandell Decl. ¶6; Oeland Decl. ¶10; Canann Decl. ¶7. Recipients who cannot move independently may develop decubitis ulcers and be unable to clean and dress themselves. Bean Decl. ¶7; Collins Decl. ¶32; Hoffacker Decl. ¶5.

Some recipients will try to clean or cook food and injure themselves as a result. Good Decl. ¶8; Vescovo Decl. ¶13-16; Canann Decl. ¶5. Without assistance preparing meals, some individuals will not know when their food is fully cooked and safe to eat, Anderson Decl. ¶4, or will burn themselves or start fires, Brown Decl. ¶4; Good ¶8 (concerned that vision impaired recipient will burn down the building if she tries to cook for herself). Others will be unable to maintain a diet that avoids exacerbating their medical conditions, Crockett Decl. ¶¶12, 16; Campbell Decl. ¶5; Collins Decl. ¶30; Medina Decl. ¶5; Oster Decl. ¶2; Jones Decl. ¶8; Sheppard Decl. ¶9; Goldberg Decl. ¶7; Castro Decl. ¶¶7, 10. Others need assistance in order to eat at all, because of mental illness or lack of appetite, Baran Decl. ¶23; Jones Decl. ¶9, or because they risk choking, Hoffacker Decl. ¶8; Canann Decl. ¶5.

Without an IHSS provider to transport them to doctor's appointments, many will go without essential care. Brent Decl. ¶4; Canann Decl. ¶¶5-6; Baran Decl. ¶22; Hathaway Decl. ¶11.

Recipients who are unable to clean their houses adequately, particularly those with impaired immune function due to HIV/AIDS, may become sick due to unsanitary conditions. Campbell Decl.¶4; Good Decl. ¶8; F.H. Decl. ¶13; Jones Decl. ¶14; Hylton Decl. ¶4; Collins Decl.

¶29. Some may try to clean their homes even though they lack the requisite strength or balance, and may injure themselves. Crockett Decl. ¶15; F.H. Decl. ¶10; Collins Decl. ¶29; Vescovo Decl. ¶18. County officials and other professionals who serve the IHSS community state unequivocally that they believe individuals will die as a result of neglect and injuries. Nicco Decl. ¶36; Goldberg Decl. ¶7; Vescovo Decl. ¶¶ 5, 21.

"[E]ntire families will be destabilized" when a child or family member is cut off IHSS, since caregiver relatives will be forced to seek other jobs without a way to care for their loved ones. Hathaway Decl. ¶5; Crockett Decl. ¶¶19-20; Kaljian Decl. ¶18; Nicco Decl. ¶27; Leiva Decl. ¶¶7-8. Without IHSS, some families may have no choice but to leave their dependent family member (including some children) unattended while they work, leading to the possibility of tragic accidents or mental and medical decline. Collins Decl. ¶33.

Even a temporary interruption in services may "result in damaging setbacks," as it may take years to find the right provider and set of services for a recipient. Baran Decl. ¶20

> Each one of the IHSS recipient affected by the cuts represents a person with a disability who has been stabilized at home, often through a painstaking process that takes months of even years, to find the right attendant, the right home or apartment, the right combination of services. All of this will be lost. And even if the cuts are restored later, it will be virtually impossible to rebuild the safe living situations people have now.

see also Gardner Decl. ¶¶ 39- 45 (describing difficulties in returning to community after hospitalization or other institutional placement).

For individuals with psychiatric disabilities, the stress of losing services may trigger symptomatic behaviors such as hurting themselves or damaging property. Gardner Decl. ¶¶36-37. Several years ago, an IHSS recipient with muscular dystrophy committed suicide after receiving a notice that her services would be cut and left a recording to explain that she did not know how it would be possible for her to continue living without that support. Vescovo Decl. ¶¶5-6.

2. Risk of Homelessness

There is also a serious risk that many individuals, particularly those with mental or cognitive disabilities, will become homeless if they lose IHSS services. Nicco Decl. ¶¶23, 35; Kaljian Decl. ¶18; Aho Decl. ¶¶13-20; Oster Decl. ¶9; Syropiatko Decl. ¶7; Calame Decl. ¶7.

Once homeless, people with mental illness decline rapidly, and may end up under a conservatorship, in a psychiatric hospital, a board-and-care facility, or even jail. Hill Decl. ¶4.[15] For example, individuals with hoarding disorders who lack IHSS are likely to lose their housing because without IHSS their homes will become unsanitary and hazardous. Syropiatko Decl. ¶7; Castro Decl. ¶7; Navarro Decl. ¶¶ 9, 15-17; Aho Dec. ¶ 16-23; Calame Decl. ¶7.[16]

3. Risk of Institutionalization

If ABX4 4 is implemented, class members also risk unnecessary institutionalization. Dr. Gardner warns of the particular risk facing individuals with mental disabilities who lose IHSS assistance to remind them to take medication, attend medical appointments, and perform tasks essential to their continued mental health. Gardner Decl. ¶¶ 30-33; *see also* Crockett Decl. ¶16; Baran Decl. ¶¶12, 24; Castro Decl. ¶10; Nicco Decl. ¶¶33-34; Navarro Decl. ¶¶15-16. Other experts have found that elderly and disabled individuals with unmet in-home care needs are at increased risk of institutionalization, LaPlante Decl. ¶7, and that the lack of affordable home care services is "a primary factor driving the need for nursing home placement," Schnelle Decl. ¶5.

County IHSS officials express further concerns that recipients who lose IHSS services as a result of ABX4 4 will suffer falls that lead to hospitalization and further institutionalization, Crockett Decl. ¶15, and that family providers forced to seek outside employment will have no choice but to place relatives in institutional settings, Nicco Decl. ¶31, Kaljian Decl. ¶15; Hathaway Decl. ¶¶5, 6. Similarly, they warn that elderly individuals who lose meal preparation services may face health declines that land them in nursing homes. Guerra Decl. ¶¶12, 14. *See also* Collins

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[15] The mental health system already gone through waves of funding cutbacks so very few resources are available; "IHSS is one of the few support services left" to people with mental illness. Hill Decl. ¶ 7.

[16] Class member Gerald Aho, who lives in a Section 8-funded apartment and receives IHSS based on his bipolar disorder, faces this risk. During periods of extreme depression Mr. Aho is unable to take the trash out, clean dishes or do his laundry. Aho Decl. ¶16. On several occasions, his apartment has become so unsanitary that he did not pass his Section 8 inspection. *Id.* ¶18. After receiving IHSS heavy cleaning and other domestic and related services, he was able to pass inspection and remain at home, rather than be forced to live in his car as in the past. *Id.* ¶¶20-23. Without IHSS Mr. Aho is in danger of becoming homeless again.

Decl. ¶26; Dillard-Foss Decl. ¶¶7-8.[17]

Institutionalization will be detrimental to IHSS recipients' quality of life and care. Placement in an institution can destabilize already compromised mental or physical functioning, and it is extremely difficult for individuals to move out of institutions and back into the community. Gardner Decl. ¶¶ 39, 45; Navarro Decl. ¶ 13. Institutionalized individuals may become habituated to institutional structures, and lose or fail to develop the skills necessary to live in a community-based setting. Gardner Decl. ¶ 40. They also may be subjected to inadequate care due to chronic understaffing. *See* Schnelle Decl. ¶6 (noting that citations for noncompliance are common); Navarro Decl. ¶13. IHSS recipients fear institutionalization because they value the independence of community living, Golledge Decl. ¶5; Oster Decl. ¶7; Wilson Decl. ¶9, and are aware that care in institutions is sometimes inadequate, Sheppard Decl. ¶12.

4. Plaintiffs Will Suffer Irreparable Injury.

Martinez v. Schwarzenegger, 2009 WL 1844989, at *5 (N.D. Cal. June 26, 2009), recently concluded that recipients would suffer irreparable harm if they were to lose IHSS assistance:

> The consumers' quality of life and health-care will be greatly diminished, which will likely cause great harm to disabled individuals. For instance, the declarations submitted by Plaintiffs describe harms ranging from going hungry and dehydration, to falls and burns, to an inability ever to leave the home. Institutionalizing individuals that can comfortably survive in their home with the help of IHSS providers will "cause Plaintiffs to suffer injury to their mental and physical health, including a shortened life, and even death for some Plaintiffs." *Crabtree v. Goetz*, 2008 WL 5330506, at *30 (M.D. Tenn.).

[17] The individual circumstances of class members support these predictions of risk. Plaintiff Oster needs IHSS assistance to remember to take his medications, shop, cook, or clean up. Oster Decl. ¶¶2-4. Before receiving IHSS services, his apartment was unsanitary and in disarray, with piles of trash, dishes and paper. *Id.* ¶8. He was under threat of eviction because of the condition of his apartment. *Id.* And fear when he learned he might lose IHSS has already caused a breakdown that required two weeks of psychiatric hospitalization. *Id.* ¶¶2, 6, 9. F.H., a woman with a traumatic brain injury due to domestic violence, may be unable to continue living independently because she falls constantly if she tries to do housework and often becomes too confused to handle domestic tasks. F.H. Decl. ¶¶5, 8-12; Leon Decl. ¶¶3-5. Plaintiff Sheppard may need to enter a nursing home because of her inability to bathe, clean house, or prepare meals. Sheppard Decl. ¶¶7-12; *see also* Worden Decl. ¶11; Wilson Decl. ¶¶ 9, 18; Hylton Decl. ¶ 9; Jansen Decl. ¶6; Anderson Decl. ¶8; Good Decl. ¶9; Canann Decl. ¶7; Leiva Decl. ¶¶7-10.

This "reduc[tion] or terminati[on of] home care services . . . would result in the deprivation of life-sustaining medical services. This certainly constitutes irreparable harm." *Mayer v. Wing*, 922 F.Supp. 902, 905, 909 (S.D.N.Y. 1996) (issuing preliminary injunction prohibiting reduction of personal home care services including "assistance with personal hygiene, dressing, feeding and housekeeping"); *see also Crabtree*, 2008 WL 5330506, at *30 (home care services cuts will cause irreparable injury because "institutionalization will cause Plaintiffs to suffer injury to their mental and physical health, including a shortened life, and even death for some Plaintiffs"); *Long v. Benson*, 2008 WL 4571903, at *2 (N.D. Fla. Oct. 14, 2008) (similar); *cf. Independent Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 658 (9th Cir. 2009) (denial of needed medical care constitutes irreparable harm); *LaForest v. Former Clean Air Holding Co.*, 376 F.3d 48, 55-56 (2nd Cir. 2004) (same, regarding reduction of retiree health benefits including increased cost of prescription medications); *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983) (same, regarding deprivation of social security benefits); *Beltran v. Meyers*, 677 F.2d 1317, 1322 (9th Cir. 1982) (same, regarding "needed medical care").

B. The Balance of Equities and Public Interest Favor Plaintiffs.

Defendants' purely fiscal interest, by contrast, is not as weighty as the risk of illness and injury to low-income public assistance recipients. *See Lopez*, 713 F.2d at 1437; *Daniels v. Wadley,* 926 F. Supp. 1305, 1313 (M.D. Tenn. 1996); *Kansas Hosp. Ass'n v. Whiteman*, 835 F. Supp. 1548, 1552-53 (D. Kan. 1993). Just this year, the Ninth Circuit held that the current California fiscal crisis does not outweigh the harm that might befall Medi-Cal beneficiaries if unlawful cuts are implemented. *See Independent Living Ctr.*, 572 F.3d at 659 ("A budget crisis does not excuse ongoing violations of federal law, particularly when there are no adequate remedies available other than an injunction."); *Martinez*, 2009 WL 1844989, at *6; *see also California Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 853 (9th Cir. 2009).[18]

Further, in addition to the harm experienced by IHSS recipients, the IHSS eligibility

[18] Moreover, the likely increased demand upon public services and threat of institutional placement means that the IHSS eligibility restrictions are unlikely to save as much money as Defendants might argue.

restrictions will cause increased demand upon other public services which are ill-positioned to bear these burdens. County emergency rooms will see seniors and people with disabilities who have experienced "dramatic declines" in their health, including falls and other injuries. Kaljian Decl. ¶12; *see also* Altman Decl. ¶5 (UCSF researcher predicts that loss of home care services will result in greater emergency room use); Nicco Decl. ¶¶23, 25, 31; Collins Decl. ¶32; Kaljian Decl. ¶17; Leon Decl. ¶5; Mandel Decl. ¶¶4, 7-9; Bailey Decl. ¶¶ 13-14; Oster Decl. ¶6; Hill Decl. ¶4. Seniors who lose assistance with food shopping and meal preparation and consequently stop eating will end up in local hospitals. Collins Decl. ¶29. County adult protective services divisions will face increased demand and no longer be able to rely upon IHSS for referrals. Collins Decl. ¶31; Nicco Decl. ¶25; Kaljian Decl. ¶20; Crockett Decl. ¶20; Baran Decl. ¶19.

An injunction is also in the public interest. *See Lopez,* 713 F.2d at 1437 (deprivation of essential benefits harms public interest even if benefits are costly to government); *Martinez*, 2009 WL 1844989 at *6. The termination of IHSS services is likely to devastate tens of thousands of families who will have no way to care for their loved ones, and place increased and untenable demands upon local government services and emergency rooms. Moreover, an injunction will also preserve the status quo *pendente lite*, which is one of the purposes of a preliminary injunction under Rule 65. *See Chalk v. U.S. Dist. Court Cent. Dist. Cal.*, 840 F.2d 701, 704 (9th Cir. 1988).

II. Plaintiffs Are Likely to Succeed on the Merits of their Due Process, Medicaid, and Americans with Disabilities Act Claims.

A. The Termination and Reduction Notices Violate Due Process Because They Are Not Reasonably Calculated to Apprise IHSS Recipients of Their Rights.

Prior to an action that will affect an interest in life, liberty, or property protected by the Due Process Clause, a State must provide "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Thus, recipients of social services must receive a "timely and adequate notice detailing the reasons for termination and an effective opportunity to defend" against it at a pre-termination, administrative hearing. *Goldberg v. Kelly*, 397 U.S. 254, 262-63, 269 (1970); *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 787 (1980). That notice must provide recipients with information they can use

to decide whether the agency has made mistakes in terminating their benefits and, if so, how they can contest those mistakes at a hearing. *Goldberg*, 397 U.S. at 266, 268; *see also Gray Panthers v. Schweiker*, 652 F.2d 146, 168 (D.C. Cir. 1981) (without adequate notice of reasons for denial "hearing serves no purpose"); *Vargas v. Trainor*, 508 F.2d 485, 490 (7th Cir. 1974) (notice is especially important because of "human tendency, even among those more experienced and knowledgeable in the ways of bureaucracies than the aged, blind and disabled persons . . . to assume that an action taken by a government agency in a pecuniary transaction is correct").[19]

Whether notice comports with constitutional requirements depends upon whether it is "tailored to the circumstances" of the recipients who must decide whether to request a hearing. *Goldberg*, 397 U.S. at 268. Thus, when the government is on notice of an individual's impairment, "even notice that complied fully with the statutory requirements [may] nonetheless not [be] reasonably calculated to provide her adequate notice." *Covey v. Town of Somers,* 351 U.S 141, 146-47 (1956); *see also Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13-15 (1978) ("[P]articularly extensive efforts to provide notice may often be required when the State is aware of a party's inexperience or incompetence."); *Jones v. Flowers*, 547 U.S. 220, 221 (2006) (due process violated when government has reason to know notice is ineffective because of "unique information about an intended recipient"); *Evans v. Chater*, 110 F.3d 1480, 1483 (9th Cir. 1997) (where disability benefits applicant was incompetent at the time he received notice of denial or termination of benefits, due process right to meaningful opportunity to be heard was implicated); *Steiberger v. Apfel*, 134 F.3d 37, 40-41 (2nd Cir. 1997) (due process violated where disability benefits claimant served with notice of termination of benefits that he was unable to understand and act upon due to mental impairment); *David v. Heckler*, 591 F.Supp. 1033, 1042 (E.D.N.Y 1984) (when notice was technical and confusing it was not comprehensible to class of disability recipients); *accord Doston v. Duffy*, 732 F.Supp. 857, 872-73 (N.D. Ill. 1988).

[19] The risk of such mistakes is extremely high here. Because functional ranks and FI scores have never before been used to determine eligibility, errors in these scores and rankings may have gone unnoticed. Since ABX4 4 was enacted, recipients have sought reevaluation of their FI scores and been reassessed with higher scores. *See supra* note 11.

Defendants' termination and reduction notices – a notice of action message and 22 pages of agency procedures lifted verbatim from official policies that are given to counties and county social workers for determining functional rank (ACL 9-56, RJN, Ex. A) – are not written so that IHSS recipients can understand and act upon them, and so are not "reasonably calculated" to provide IHSS recipients with the meaningful and comprehensible information that due process requires. Social workers, the intended audience for these 22 pages, have undergone extensive training in the use of functional ranks they discuss. ACIN I-61-89; ACL 88-118, RJN, Ex. F at 14-21. Recipients, by contrast, have never even seen functional ranks or an FI Score before now. *See* supra at 11-12 & nn. 11-12. The 22 pages also outline the complex mathematical formula for computing FI Scores, which recipients (and, for that matter, most social workers) have never before seen. ACL 9-56, RJN, Ex. A. Defendant CDSS itself terms the description of this formula "difficult to conceptualize" even for trained social workers. ACIN I-61-89, RJN, Ex. F at 10. To expect disabled recipients to understand this notice, without training and explanation, is a cruel hoax. To be meaningful, the notice would need to put the recipient on notice that in order to retain IHSS eligibility he or she would need to present evidence to increase one or more functional ranks which, when multiplied by the weight for each function and added together, would produce a score of 2.0 or more. Because of its confusing, technical content, the planned notice will not convey this key information to IHSS recipients.

The notice is defective in other ways as well. It is misleading, in that the 22 pages include descriptions of the three mental functions of memory, orientation and judgment, even though these functional ranks are completely irrelevant to determining either the FI Score or any functional rank used in computing it, or to eligibility for domestic and related services. The notice fails to inform recipients that they may contest the ranks for all 11 functions, even those ranked "1" for which they are not authorized any hours, in order to raise their composite FI Score.

The language, format, and timing of these notices will not allow recipients to ascertain whether counties made errors in their FI Scores or functional ranks--figures they have never seen before--and whether, if they contest them, they can raise their FI Scores to 2.0 or raise their functional ranks for domestic or related services to 4. This makeshift termination notice is plainly

not tailored to the capacity of IHSS recipients and does not satisfy procedural due process standards.[20]

B. ABX4 4 Violates the Medicaid Act's Comparability, Reasonable Standards, And Sufficiency Requirements.

The Medicaid program was established by Title XIX of the Social Security Act in 1965 to enable states to provide medical services to individuals with limited ability to pay for health care. 42 U.S.C. § 1396-1396v. Medicaid is a cooperative program between federal and state governments that allows states to receive federal financial assistance for the provision of medical assistance to low-income individuals. 42 U.S.C. § 1396. Participation is voluntary, but when a state chooses to participate, it must comply with the Medicaid Act and its implementing regulations. 42 U.S.C. § 1396; *Alexander v. Choate,* 469 U.S. 287, 289 n.1 (1985).[21]

1. By Providing Differing Levels of Medical Assistance to Individuals With Similar Needs, ABX4 4 Violates the Comparability Requirement of the Medicaid Act.

The "comparability" requirement of the Medicaid Act, 42 U.S.C. § 1396a(a)(10)(B), provides "that medical assistance made available to any individual described in subparagraph (A) [describing categorically needy recipients] — (i) shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual, and (ii) shall not be less in amount, duration, or scope than the medical assistance made available to individuals not described in subparagraph (A)."[22] In effect, the comparability requirement mandates "comparable services

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[20] In addition to violating procedural due process, the planned notice of action also violates the ADA and Section 504 because it is not reasonably accessible to people with disabilities. *See Alexander v. Choate*, 469 U.S. 287, 301 (1985); *see also Henrietta D. v. Gulliani*, 119 F. Supp. 2rd 181 (E.D.N.Y. 2000), *aff'd*, 331 F.3d 261 (2nd Cir. 2003) (state must make process to obtain benefits meaningfully accessible to individuals with disabilities).

[21] As set forth in the Complaint, many of plaintiffs' Medicaid claims are brought pursuant to 42 U.S.C. § 1983. As the Ninth Circuit held in *Independent Living Center of Southern California, Inc. v. Shewry*, 543 F.3d 1050 (9th Cir. 2008), *cert. denied sub nom. Maxwell-Jolly v. Independent Living Center of S. California*, 129 S.Ct. 2828 (2009), all of the Medicaid provisions at issue are also enforceable directly under the Supremacy Clause.

[22] *See* 42 C.F.R. § 440.240 ("(a) The state must provide that the services available to any categorically needy recipient under the plan are not less in amount, duration, and scope than those services available to a medically needy recipient; and (b) The plan must provide that the services

when individuals have comparable needs," and it is violated "when some recipients are treated differently from other recipients where each has the same level of need." *Jenkins v. Washington State Dep't Social & Health Servs.*, 157 P.3d 388, 392 (Wash. 2007); *see also Sobky v. Smoley*, 855 F. Supp. 1123, 1139 (E.D. Cal. 1994) (comparability requirement "creates an equality principle by which all categorically needy individuals must receive medical assistance which is no less than that provided to any other categorically or medically needy individual"); *Hodgson v. Bd. of County Comm'rs, Hennepin County*, 614 F.2d 601, 608 (8th Cir. 1980) ("Once a state designates services it will subsidize, it may distinguish between eligible and ineligible recipients only on the basis of their degree of medical need.").

Courts have thus found that states violate the Medicaid Act when they fail to offer the same service to all with the same need. *See*, *e.g.*, *Conlan v. Bonta*, 102 Cal.App.4th 745, 753-54 (2002) (comparability violated where state policy resulted in some Medi-Cal recipients incurring unreimbursed expenses); *Parry v. Crawford*, 990 F.Supp. 1250, 1257 (D. Nev. 1998) (comparability violated where state provides Intermediate Care Facility for the Mentally Retarded only to those with mental retardation, not those with "related conditions" and no basis on which to infer difference in medical need); *Charpentier v. Belshe*, 1994 WL 792591, at *5 (E.D. Cal. Dec. 21, 1994) (limiting reimbursement for those eligible for both Medi-Cal and Medicare to no more than 20% of Medicare's reasonable charge while placing no such limitation on Medi-Cal-only recipients violates comparability requirement).

Jenkins is directly on point. There, the state had previously determined the number of hours of home health care services needed by recipients, based on assessment of their ability to perform daily living activities. The state then reduced the number of hours that would be provided to recipients whose caregiver lived with them, on the theory that the caregiver would, for example, need to clean their own houses and should not be paid for this effort. The reduction was applied without any individual assessment of need; rather, it operated as an "irrebuttable presumption."

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available to any individual in the following groups are equal in amount, duration, and scope for all recipients within the group: (1) The categorically needy. (2) A covered medically needy group.").

157 P.3d at 390. The Washington Supreme Court held that the state violated the comparability requirement because it "reduce[d] a recipient's benefits based on a consideration other than the recipient's actual need." *Id.* at 393; *see also White v. Beal*, 555 F.2d 1146, 1151 (3rd Cir. 1977) (optional state Medicaid services must be "distributed in a manner which bears a rational relationship" to underlying federal purpose of helping those in greatest need; provision of glasses only to recipients with eye diseases, but not refractive error, violated comparability requirement); *Jeneski v. Myers*, 163 Cal.App.3d 18 (1984) (across-the-board restrictions violated Medicaid comparability requirement by failing to account for individual needs).

By definition, *all* individuals currently receiving IHSS services have been found to need such services (in some amount) in order to remain safely in their home. Thus, they have already been determined to meet the same threshold level of need through an individualized assessment. An across-the-board termination of all recipients with an FI Score below 2.0, and an across-the-board elimination of domestic and related services for all recipients with a functional rank below 4, without any examination of their individual circumstances, will deprive tens of thousands of IHSS recipients of services that they need just as critically as the remaining IHSS recipients whose FI Scores are above 2.0 or whose functional ranks for domestic or related services are 4 or 5. This is because, as previously discussed, neither the composite FI Score nor the functional ranks are meaningful measures of need, and need is the only basis upon which distinctions can be made without violating the comparability requirement. Thus, using the fundamentally flawed FI Scores and functional ranks to distinguish between those who receive IHSS services and those who do not violates the comparability requirement.

Moreover, because of the way FI Scores are calculated, individuals with cognitive or mental disabilities, children, and those who do not need the full range of services (but for whom the needed services are critical to remain safely at home) may receive FI Scores lower than warranted by their actual need. These individuals will be entirely cut off from IHSS services despite the fact that they desperately need these services in order to remain safely in their homes.

Because neither the functional ranks nor the FI Score reflect the criticality of the service and whether a recipient is safe at home without the service, and because the State has previously

determined recipients' actual need and allocated IHSS services accordingly, the State's use of the false and arbitrary proxies of FI Scores and functional ranks to determine eligibility for services violates Medicaid's comparability requirement by treating similarly situated recipients differently. *See Jenkins*, 157 P.2d at 393.

2. By Authorizing IHSS Services Based On Functional Index Score and Functional Ranks, ABX4 4 Violates the Reasonable Standards Requirement.

The Medicaid Act further requires that all participating states employ "reasonable standards … for determining … the extent of medical assistance under the plan which … are consistent with the objectives of this subchapter." 42 U.S.C. § 1396a(a)(17); *see also Wisconsin Dep't of Health & Fam. Serv. v. Blumer*, 534 U.S. 473, 479 (2002); *Schweiker v. Gray Panthers*, 453 U.S. 34, 36-37 (1981). The primary objectives of the Medicaid program are to provide medical assistance to individuals whose income and resources are insufficient to meet the costs of necessary medical services and to furnish "rehabilitation and other services to help such … individuals attain and retain capability for independence or self care." 42 U.S.C. § 1396-1.

When state Medicaid rules deny coverage of services on an arbitrary or irrational basis, courts have invalidated those state rules as contrary to the reasonable standards requirement. *See Lankford v. Sherman*, 451 F.3d 496, 511-13 (8th Cir. 2006) (plaintiffs likely to succeed on reasonable standards claim where state unreasonably restricted optional medical equipment benefit); *Hern v. Beye*, 57 F.3d 906, 910-11 (10th Cir. 1995) (state law restricting medically necessary treatment to those whose lives were at risk not reasonable standard); *Preterm, Inc., v. Dukakis*, 591 F.2d 121, 131 (1st Cir. 1979) (state could not restrict medically necessary services solely on basis of diagnosis); *White,* 555 F.2d at 1151 (enjoining policy for glasses coverage because it "discriminated based upon etiology rather than the need for services"); *Allen v. Mansour*, 681 F.Supp. 1232, 1238 (E.D. Mich. 1986) (state medical necessity criteria arbitrary when unsupported by expert opinion or scientific data).

Defendants' termination of IHSS services based on FI Scores and functional ranks is even more arbitrary and capricious than state actions found elsewhere to violate Medicaid's reasonable standards requirement. As Plaintiffs have amply demonstrated, FI Scores and functional ranks

were never intended to measure "need" for IHSS services, and cannot reasonably be used for this purpose. *See supra* at 8-13. FI Scores and functional ranks have not been scientifically designed or validated, and CDSS has acknowledged that the FI Score is not a meaningful measure. Kline Decl. Ex. E. Defendants have not even offered, nor does ABX4 4 provide, an exceptions process through which individuals with FI Scores below 2.0 or ranks below 4 for domestic and related services could demonstrate their actual level of need for services. By arbitrarily denying and reducing access to IHSS based solely on FI Score and functional ranks, Defendants employ an unreasonable standard to determine the extent of medical assistance in violation of § 1396a(a)(17).[23]

3. By Failing to Provide Adequate Domestic and Related Services, ABX4 4 Violates the Sufficiency Requirement.

Medicaid's related "sufficiency" requirement mandates that "[e]ach service must be sufficient in amount, duration, and scope to reasonably achieve its purpose." 42 C.F.R. § 440.230(b). Thus, when a state has committed to provide a Medicaid service, the sufficiency requirement ensures that it adequately fulfills that obligation. To determine whether the service is sufficient, a court considers whether the level of service achieves the specific program's purposes. *Curtis v. Taylor*, 625 F.2d 645, 651 (5th Cir. 1980).

For example, reductions in a children's dental health program violate the sufficiency requirement where the resulting program fails to achieve its preventative, maintenance and restorative purposes. *Mitchell v. Johnson*, 701 F.2d 337, 347-51 (5th Cir. 1983); *see also Weaver v. Reagen*, 886 F.2d 194, 197-200 (8th Cir. 1989) (where state elects to provide prescription drugs, program's failure to cover prescription of AIDS drug to certain individuals for whom that drug is medically necessary violates sufficiency requirement); *Charpentier*, 1994 WL 792591, at *5

[23] Additionally, because ABX4 4 uses FI Scores and functional ranks which have a disparate impact on recipients with mental, as opposed to physical, impairments, it is inconsistent with the related regulation that prohibits arbitrary limitations on required services "based solely on diagnosis, type of illness, or condition." 42 C.F.R. § 440.230(c); *see White*, 555 F.2d at 1152 (applying §440.230(c) to determine whether state used reasonable standards to limit provision of optional benefit).

(limiting reimbursement for those eligible for both Medi-Cal and Medicare to no more than 20% of Medicare's reasonable charge, such that affected individuals are denied supplies and equipment, violates sufficiency requirement).

Here, the elimination of domestic and related services to individuals eligible for IHSS would result in the insufficient provision of IHSS services. Without domestic and related services, the IHSS services that remain cannot reasonably achieve the purpose of the IHSS program, as defined by statute, to provide services to those "who cannot safely remain in their homes or abodes of their own choosing unless these services are provided." Welf. & Inst. Code § 12300(a). The services currently authorized for IHSS recipients are, by definition, necessary to permit these individuals to remain safely in their home. MPP § 30-761.1; *see supra* at 2-7.

For example, as a result of the cuts, Plaintiff Dotty Jones would remain eligible for some IHSS but lose all help with cleaning and meal preparation. Jones Decl. ¶3. Jones has AIDS and related medical complications, including neuropathy, pervasive weakness, mouth sores and breathing difficulties. Since she cannot cook or clean for herself, she is likely to stop eating or be unable to keep her apartment free of dust and infection, putting her at risk of a medical crisis and hospitalization. Without adequate nutrition and a healthy environment, Ms. Jones' remaining IHSS hours will do little to keep her safely at home. This provision of ABX4 4 thus violates the sufficiency requirement by failing provide services adequate to achieve the purpose of the IHSS program.[24]

C. ABX4 4 Violates Title II of the ADA and Section 504 of The Rehabilitation Act.

Title II of the ADA states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. To establish a violation of the ADA, a plaintiff must show: "(1) he is a 'qualified

[24] As Medi-Cal recipients under age 21, Plaintiffs V.L. and C.R. have an additional claim: ABX4 4 violates federal mandates for Early and Periodic Screening, Diagnosis and Treatment (EPSDT). Amended Complaint ¶¶220-231. The Court need not reach this issue at present, however, because the requested TRO and preliminary injunction, if granted, will protect EPDST-eligible plaintiffs from injury.

individual with a disability'; (2) he was either excluded from participation in or denied benefits of a public entity's services, programs or activities, or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits or discrimination was by reason of his disability."[25] *See Weinreich v. Los Angeles County Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997). Here, Plaintiffs are qualified individuals with disabilities in that they are capable of living independently in their own homes with assistance and meet the Medicaid income eligibility requirements.

Plaintiffs are likely to prevail in showing that ABX4 4 violates the ADA in myriad ways: (1) violating the "integration mandate" of the ADA by placing people at serious risk of having to move out of their homes to less integrated settings and institutionalization, *Olmstead v. Zimring,* 527 U.S. 581 (1999); (2) discriminating against IHSS recipients with cognitive and psychiatric disabilities; and (3) utilizing methods of administration that discriminate against people with disabilities, which is prohibited by 28 C.F.R. § 35.130(b)(3).

1. ABX4 4 Violates the ADA's Integration Mandate by Placing People with Disabilities at Risk of Unnecessary Institutionalization.

Implementation of ABX4 4 will place class members at risk of unnecessary confinement in institutional settings such as nursing homes and psychiatric facilities in violation of the ADA's integration mandate. In adopting the ADA, Congress recognized that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem," and that "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, ... failure to make modifications to existing

[25] The ADA and Section 504 apply to "all facets of state government." *Bay Area Addiction Research, Inc. v. City of Antioch*, 179 F.3d 725, 731 (9th Cir. 1999). Because of the absence of any significant difference between the substantive standards of the ADA and Section 504, *see* 29 U.S.C. §794(a), the claims may be analyzed together. *See, e.g., Giebeler v. M & B Assocs.*, 343 F.3d 1143, 1149 (9th Cir. 2003) (internal quotation marks omitted). The only difference is that Section 504 also requires the plaintiff to demonstrate that the relevant program receives federal funding. *Henrietta D.*, 331 F.3d at 272.

facilities and practices, ... [and] segregation." 42 U.S.C. § 12101(a)(2), (5).

To this end, ADA regulations require provision of services in the most integrated setting possible: "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified persons with disabilities." 28 C.F.R. § 35.130(d). "The 'most integrated setting' is defined as 'a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.'" *Brantley v. Maxwell-Jolly*, 2009 WL 2941519, at *6 (N.D.Cal. Sept. 10, 2009) (citing 28 C.F.R. pt. 35 app. A; *Olmstead*, 527 U.S. at 592). This mandate "serves one of the principal purposes of Title II of the ADA: ending the isolation and segregation of disabled persons." *Arc of Wash. State Inc. v. Braddock*, 427 F.3d 615, 618 (9th Cir. 2005); *see also Brantley*, 2009 WL 2941519 at *6.

In *Olmstead*, the Court applied these integration and anti-isolation principles, holding that the ADA prohibits "[u]njustified isolation of the disabled." *Olmstead*, 527 U.S. at 597. The Court reasoned that unnecessary institutional placement "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life," and "severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Id.* at 600-01 (citations omitted). To establish an *Olmstead* claim, a plaintiff must show (1) the state's treatment professionals have determined that community-based services are appropriate, (2) the disabled individual does not oppose such community-based treatment, and (3) the provision of community-based services can be reasonably accommodated, taking into account the resources available to the state and the needs of other individuals with disabilities.[26] 527 U.S. at 587.

Although *Olmstead* addressed ongoing institutionalization, plaintiffs who currently reside in community settings may assert ADA integration claims to challenge state actions that give rise to a risk of unnecessary institutionalization. *See Fisher v. Oklahoma Health Care Auth.,* 335 F.3d

[26] The Ninth Circuit has also analyzed the integration mandate claim under the more general test applicable to ADA claims brought under Title II. *See Townsend v. Quasim,* 328 F.3d 511 (9th Cir. 2003) (citing *Duvall v. County of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001)); *Brantley*, 2009 WL 2941519 at *7. Plaintiffs prevail under either formulation.

1175, 1181-82 (10th Cir.2003) (imposition of cap on prescription medications placed participants in community-based program at high risk for premature entry into nursing homes in violation of ADA); *Ball v. Rodgers*, 2009 WL 1395423 at *5 (D. Ariz. Apr. 24, 2009) (defendants' failure to provide plaintiffs with needed services "threatened Plaintiffs with institutionalization, prevented them from leaving institutions, and in some instances forced them into institutions in order to receive their necessary care in violation of the ADA and Rehab Act"); *Mental Disability Law Clinic v. Hogan*, 2008 WL 4104460 at * 15 (E.D.N.Y. Aug.28, 2008) ("[E]ven the risk of unjustified segregation may be sufficient under *Olmstead*"); *M.A.C. v. Betit*, 284 F.Supp.2d 1298, 1309 (D. Utah 2003) (integration mandate applies to those at risk of institutionalization); *Makin ex rel. Russell v. Hawaii*, 114 F.Supp.2d 1017 (D. Haw. 1999) (denying summary judgment because statute at issue "could potentially force Plaintiffs into institutions in violation of the ADA's non-discrimination policy since the State's Medicaid statute fails to offer all qualified disabled people services in the 'most integrated setting possible'").

Here, the statutes and regulations that govern the IHSS program themselves establish that the elimination of services for members of the plaintiff class will place them at risk of unnecessary institutionalization. *See supra* at 2, 5-6. Also, the evidence submitted herewith demonstrates a dramatic risk of institutionalization for many class members. *See supra* at 17-18.

In similar circumstances, courts have found violations of the ADA's integration mandate. For example, in *Fisher*, the Tenth Circuit held that recipients of community-based Medicaid services could challenge a state-imposed limitation (enacted for budgetary reasons) of five prescriptions per month, which did not apply to residents of nursing homes, because they "st[oo]d imperiled with segregation" under the new policy. 335 F.3d at 1178-79, 1181-82; *see also Crabtree*, 2008 WL 5330506, at *25 (M.D. Tenn. Dec. 19, 2008) (enjoining state from reducing maximum allowable hours of home health care services because it would "eliminate services that enable Plaintiffs to remain in their community placement" and thereby "cause their institutionalization into nursing homes").

Finally, maintenance of current IHSS eligibility standards constitutes a reasonable modification that would not require fundamental alteration of the program. Even assuming that

requiring Defendants to maintain current standards *could* constitute a fundamental alteration, it is well-established that "budgetary constraints alone are insufficient to establish a fundamental alteration defense." *Penn. Protection & Advocacy, Inc. v. Penn. Dept. of Public Welfare*, 402 F.3d 374, 380 (3rd Cir. 2005); *see also Frederick L. v. Dept. of Public Welfare of Com. Of Penn.*, 364 F.3d 487, 495-96 (3rd Cir. 2004); *Fisher*, 335 F.3d at 1182-83. ABX4 4's exclusive purpose was such budget savings. Moreover, if even a small proportion of the 133,000 IHSS recipients at risk here end up in hospitals, emergency rooms or nursing homes, the cost to taxpayers may actually be far greater than the entire cost of the IHSS program. *See supra* at 6-7, 19-20.

2. ABX4 4 Discriminates Against People with Psychiatric and Cognitive Disabilities.

Implementation of ABX4 4 would also violate the ADA because the use of the composite FI Scores and functional ranks as criteria to determine IHSS eligibility criteria will have a uniquely detrimental effect upon people with psychiatric and cognitive disabilities and tend to exclude them from IHSS.

Actionable discrimination under the ADA may be established through a showing that a facially neutral rule has a uniquely detrimental impact upon persons with disabilities; for example, that its effect would be to deny individuals with disabilities meaningful access to government-provided services due to their unique needs. *See Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996) (facially neutral 30-day quarantine on animals); *Rodde v. Bonta*, 357 F.3d at 998 (9th Cir. 2004) (closure of county hospital). Similarly, the use of "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" violates the ADA "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); *see also Guckenberger v. Boston Univ.*, 974 F. Supp. 106, 122-23, 135, 139-40 (D.Mass. 1997) (imposition of requirements that may discourage students with learning disabilities from seeking accommodations); *Coleman v. Zatechka*, 824 F.Supp. 1360, 1368 (D. Neb. 1993) (eligibility requirements imposed upon students with disabilities seeking to participate in roommate assignment program).

Here, ABX4 4 has a uniquely detrimental and disproportionate impact upon persons with cognitive and psychiatric disabilities, in two primary ways. First, individuals with cognitive and psychiatric disabilities, many of whom may require verbal encouragement or cueing rather than physical assistance, are likely to receive lower functional ranks than individuals with physical disabilities, which will render them ineligible for domestic and related services – even though their need for assistance is just as critical. *See supra* at 9-10. Second, the way in which the FI Score is calculated tends to result in lower FI Scores for recipients with mental disabilities, such that their IHSS benefits will be terminated while services authorized for recipients with physical disabilities will not be terminated. *See supra* at 13. The use of these measures to determine IHSS eligibility cannot be characterized as necessary to the program when neither is currently in place; rather, they have been adopted purely as cost-cutting measures.

In *Olmstead*, the Court clarified that the ADA does not limit its protections to situations involving discrimination that disfavors members of a protected class in comparison to individuals outside of that class; rather, the ADA also forbids discrimination *among* members of the same protected class. *See Olmstead*, 527 U.S. at 598 (concluding that the latter is within the scope of the "comprehensive view of the concept of discrimination advanced in the ADA"); *id.* at 598 n. 10 (rejecting dissent's assertion that the "Court has never endorsed an interpretation of the term 'discrimination' that encompassed disparate treatment among members of the same protected class") (citing *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312 (1996)).[27] This proposition that the ADA requires even-handed treatment among the disabled derives logically from the fact that the ADA affords "individualized protection against illegal conduct," not group protection. *EEOC v. Staten Island Sav. Bank*, 207 F.3d 144, 151 (2nd Cir. 2000) (citing *Olmstead*, 527 U.S. at 598 n. 10). Thus, the key question is whether an entity covered by the ADA has discriminated against an individual because of that individual's disability – here, against members

[27] In *O'Connor*, the Court held that a plaintiff asserting age discrimination need not show that he was replaced by a younger employee outside of the protected category in order to establish a prima facie case. 517 U.S. at 312. Rather, the plaintiff needed show only that he "ha[d] lost out because of his age," even if it was to another member of the protected class. *Id.*

of the plaintiff class with cognitive or psychiatric disabilities. *See Olmstead*, 527 U.S. at 598.

Accordingly, courts have held actionable under the ADA discrimination based on type or degree of disability in cases involving programs that are available only to the disabled. *See, e.g., Wagner v. Fair Acres Geriatric Ctr.*, 49 F.3d 1002, 1010 (3rd Cir. 1995) (refusal to admit Alzheimer's patient who suffered from particularly severe disturbances violated Rehabilitation Act); *Hamlyn v. Rock Island County Metro. Mass Transit Dist.*, 986 F. Supp. 1126, 1131 (C.D. Ill. 1997) (exclusion of individuals with AIDS from reduced transit fare program available to other individuals with disabilities violated Rehabilitation Act and ADA); *Winkler v. Interim Svcs., Inc.*, 36 F.Supp.2d 1026, 1029 (M.D. Tenn. 1999) (exclusion of severely disabled individuals from program providing home health services to individuals with disabilities would violate Rehabilitation Act). Here, the implementation of ABX4 4 will have a uniquely detrimental effect upon individuals with cognitive and/or psychiatric impairments in that it will tend to exclude them from IHSS services. Moreover, the basis on which these individuals will be excluded bears no relation to their actual need for the services because the functional ranks and FI Score were not designed to measure criticality of need. Relying on an unreasonable and arbitrary basis for excluding these disabled individuals denies them meaningful access and violates the ADA and Section 504.

3. ABX4 4 Uses Methods of Administration that Discriminate Against People with Disabilities.

The ADA prohibits methods of administration that have a discriminatory effect on people with disabilities. *See Alexander*, 469 U.S. at 296-97; *Helen L. v. DiDario*, 46 F.3d 325, 335 (3rd Cir. 1995); *Crowder*, 81 F.3d at 1484. The ADA's implementing regulations state:

> A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration: ¶ (i) That have the *effect of* subjecting qualified individuals with disabilities to discrimination on the basis of disability; ¶ (ii) That have the purpose or *effect of* defeating or *substantially impairing accomplishment* of the objectives of the public entity's program with respect to individuals with disabilities. . . .

28 C.F.R. § 35.130(b)(3) (emphasis added); *see also* 28 C.F.R. § 41.51(b)(3)(i); 45 C.F.R. §

84.4(b)(4) (Section 504). [28]

The purpose of the IHSS program is "to enable the aged, blind or disabled poor to avoid institutionalization by remaining in their homes with proper supportive services." *Miller,* 148 Cal.App.3d at 867; *see also* Welf. & Inst. Code § 12300(a) (IHSS provides services to those who "cannot safely remain in their homes . . . unless these services are provided"). Defendants' new criteria for deciding IHSS eligibility will significantly impair the purpose of the IHSS program because, among other things, they will cause thousands of individuals to lose IHSS they have already been found to need based on calculations that were not developed to measure the need for IHSS, do not in fact measure that need, and, when applied, cause arbitrary reductions and terminations of supportive services among people with disabilities. *See supra* at 8-13.

Defendants' new methods of administration will also subject individuals to disability discrimination. The scoring criteria will screen out many individuals with cognitive and psychiatric disabilities. *See supra* at 9-10, 13. They will also exclude from domestic and related services individuals who have been found to need these services to remain safely in their homes. The methods of administration regulations are also violated by, *inter alia*, terminating eligibility and services without providing for an individualized exception process for individuals whose scores may be technically accurate but who need IHSS in order to remain safely in their own homes and to avoid institutionalization, without proper notice and a hearing, and without adequate time to arrange for any alternative services that are in fact available.

Terminating services based on inaccurate assessments, or based on accurate rankings and scores that do not reflect who may remain safely in their homes without IHSS, impair the purpose of the IHSS program and so violate the ADA. *See Brantley*, 2009 WL 2941519 at *11 (plaintiffs likely to succeed on claim that defendants' failure to provide sufficient notice and information regarding reduction in Medi-Cal services violated methods of administration regulation); *Kathleen*

[28] Because Congress explicitly authorized the Attorney General to promulgate regulations to implement Title II of the ADA, these regulations must be given controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute. *See* 42 U.S.C. § 12134; *Parker v. Universidad de Puerto Rico*, 225 F.3d 1, 5 n.5 (1st Cir. 2000).

S. v. Pennsylvania Dep't of Publ. Welfare, 10 F.Supp.2d 460, 471 (E.D.Pa. 1998) (state's "failure to adequately plan for the community placements" it had already determined appropriate by shifting needed funds within a reasonable time constituted discriminatory methods of administration).

CONCLUSION

For all the foregoing reasons, Plaintiffs request that this Court issue a preliminary injunction.

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Respectfully Submitted,

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