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

19 V.L., *et al.*,

20)
21) Plaintiffs

22 v.

23 WAGNER, *et al.*,

24) Defendants

) **Case No.: CV 09-04668 JSW**

) **CLASS ACTION**

) **PLAINTIFFS' OPPOSITION TO**
) **DEFENDANTS' ADMINISTRATIVE**
) **MOTION PURSUANT TO LOCAL**
) **RULE 7-11 TO CONDUCT LIMITED**
) **DISCOVERY OF NAMED PLAINTIFFS**

) Hearing Date: October 16, 2009
) Place: Courtroom 11, 19th Floor
) Judge: The Honorable Jeffrey S. White
)
27)

1 Plaintiffs file this Opposition to Defendants' request to conduct the depositions of the
2 individual named Plaintiffs and their Guardian Ad Litem this week. This is a class action lawsuit
3 seeking a Temporary Restraining Order and/or Preliminary Injunction, and permanent injunctive
4 relief, to stop Defendants from terminating or reducing critical In-Home-Supportive Services
5 ("IHSS") to 133,000 elderly, disabled, or blind Californians who depend upon these services to
6 remain safely in their homes.

7 **I. PLAINTIFFS ARE WILLING TO ENGAGE IN MUTUAL, LIMITED DISCOVERY**
8 **PROVIDED CLASS MEMBERS ARE NOT PREJUDICED BY TERMINATIONS OR**
9 **REDUCTIONS OF SERVICE DURING THE DISCOVERY PERIOD.**

10 Prior to filing their Motion for a Temporary Restraining Order and Preliminary Injunction,
11 Plaintiffs proposed to Defendants that both sides be permitted to take limited depositions of key
12 witnesses for the purpose of preparing for the motion for a preliminary injunction in this case,
13 provided that class members rights' were not prejudiced in the interim by the termination and
14 reduction of IHSS services. Leyton Decl. ¶ 2, 3. Accordingly, Plaintiffs' Counsel proposed that the
15 state agree to postpone the pending IHSS terminations and reductions for one month to permit
16 limited discovery. Leyton Decl. ¶ 2, 3. Defendants rejected this solution, and have refused to
17 postpone the terminations and reductions in order to allow both sides to engage in mutual discovery
18 on a reasonable schedule. Leyton Decl. ¶ 5.

19 In the absence of a stipulation from Defendants, a Temporary Restraining Order, as requested
20 by Plaintiffs, would allow the hearing on the preliminary injunction to proceed on a less compressed
21 schedule, allowing for mutual focused discovery while still fully protecting the rights of the Plaintiff
22 class.

23 Instead, Defendants propose lopsided discovery of only the named Plaintiffs and their
24 Guardians within the next four days. Given that Plaintiffs are elderly or have mental disabilities,
25 and/or their Guardian Ad Litem have responsibilities for caring for their children with disabilities,
26 additional time beyond a few days is necessary for Plaintiffs' counsel to meet with and prepare these
27 witnesses for deposition, arrange for accessible transportation, arrange for attendant care during the
28 deposition, ensure that Plaintiffs medical needs are accommodated, and/or arrange for alternative
care givers to provide care to minor children with disabilities during the deposition. Lagahid Decl. ¶

1 11 (Doc. No. 34) (mother, who is the *guardian ad litem*, has extensive physical disabilities and uses
2 a wheelchair); Sheppard Decl. ¶¶ 3, 4, 6 (Doc. No. 37) (cannot go into community without IHSS
3 provider who comes only twice a week for four hours, has fluctuating health due to medical
4 conditions and uses a wheelchair); Rivera Decl. ¶ 6, 11, 44 (Doc. No. 38) (mother, who is the
5 primary caregiver for Plaintiff C.R., has two other young children, C.R. cannot walk or talk); Jones
6 Decl. ¶ 9 (Doc. No. 39) (has difficulty walking due to neuropathy); Oster Decl. ¶ 4, 6 (has
7 fluctuating mental health needs and need for medication). Plaintiffs previously raised this issue with
8 Defendants. Leyton Decl. ¶ 4. Defendants' particular proposed discovery is neither necessary nor
9 appropriate at this stage of the case, but in any event could not occur within the next week without
10 substantial prejudice to Plaintiffs and the proposed class representatives.

11 **II. DEPOSITION TOPICS PROPOSED BY DEFENDANTS ARE UNIQUELY WITHIN**
12 **DEFENDANTS' KNOWLEDGE OR ARE OTHERWISE IRRELEVANT AND**
13 **UNNECESSARY**

14 Defendants claim that depositions are necessary in order to establish four facts. Motion p. 23.
15 However, these particular facts are either exclusively within Defendants' knowledge and control or
16 irrelevant at this stage of the proceedings. Defendants have not specified what facts are relevant to
17 any defense to the motions for class certification or preliminary injunction that are not in plaintiffs'
18 county case files and their own records. Defendants' have access to all such information.

19 A. Proffered Reason 1: Defendants do not need to depose Plaintiffs to know whether
20 their IHSS services will actually be reduced or terminated, and in fact such
21 information is SOLELY in the Defendants' control at this time. It is particularly
22 ironic that Defendants propose to depose Plaintiffs to find out whether they will lose
23 their IHSS services.

24 Plaintiffs have not yet received official notices of the cuts, and while some of
25 them have sought and received some preliminary information from their respective
26 counties, none of them know for sure what will happen. Rivera Decl. ¶¶ 8 and 40
27 (Doc. No. 38); Oster Decl. ¶¶ 5 and 11 (Doc. No. 35); Sheppard Decl. ¶ 13 (Doc. No.
28 37) ; Lagahid Decl. ¶ 9 (Doc. No. 34); Jones Decl. ¶ 18 (Doc. No. 37). In contrast, it

1 is Defendants, not the Named Plaintiffs, who are in the unique position of knowing
2 whether services “will actually be reduced or terminated.” The All County Letter
3 (ACL), issued by Defendants on October 1, details the process for calculating the
4 terminations, determining who will lose eligibility or have their IHHS services
5 reduced. Request for Judicial Notice, Exhibit A (Doc. No. 18). The process starts
6 with “functional ranks” that have been determined by county social workers, and not
7 yet revealed to Plaintiffs or other class members. *Id.* at 2-3. Then, Defendants will
8 generate the Functional Index scores (FI), based on data entered by the counties into
9 the Defendants’ computer system. The FI Score “is a system driven calculation that
10 is computed by the Case Management, Information and Payrolling System (CMIPS)
11 based on the FI Ranks entered by the county for each functional area.” *Id.* at 2.
12 Following the determination of the FI Score, the CMIPS system will identify and
13 terminate recipients, and generate the notices of action informing the recipient of the
14 termination. *Id.* at 4. The state will then, through the CMIPS system, “generate a
15 report of terminated recipients that will be provide to counties... that will include
16 recipient name, recipient number, FI score” and other information. *Id.* at 4. This
17 information will not be available on line but will be mailed to the county offices. *Id.*
18 at 4..

19 Furthermore, Defendants Wagner and CDSS have control over all IHSS
20 recipients' entire case files because the county welfare departments act as their agents
21 in administering the IHSS program (*Miller v. Woods* (1983) 148 Cal.App.3d 862,
22 868.) State law gives them control over all county social service records and the right
23 to "make rules, regulations governing the custody, use and preservation of all records.
24 . ." which are "binding" on the counties. (Welf. & Inst. Code § 10850, subd. (c).)
25 State regulations give their attorneys the right to obtain a copy of the entire case file
26 from the county when the IHSS recipient is a party in a suit. (MPP § 19-004.5.)
27 Defendants also have extensive information in their own computerized record system
28 known as Case Management, Information and Payrolling System (CMIPS).

1
2 Defendants already know whose services will be terminated or reduced..
3 Plaintiffs do not. Deposing Plaintiffs on this issue would be an entirely useless
4 exercise, and provide nothing helpful to the Court.

5 B. Proffered Reason 2: Defendants do not need to depose Plaintiffs to determine
6 whether alternative services are available to them. Plaintiffs have not yet received
7 official notices of the terminations and reductions in benefits, and have not received
8 any information about what alternatives the state may be willing to provide. Rivera
9 Decl. ¶¶ 4-5 (Doc. No. 38); Lagahid Decl. ¶ 11 (Doc. No. 34. Without information
10 from Defendants, the class representatives are not going to have the information or
11 expertise to determine what alternative Medi-Cal or state services might be available
12 to assist them.
13

14 Again, this information is entirely within the control of the Defendants and their
15 agents, since they are the ones most familiar with the range of available State
16 services. (*Brantley, et al v. Maxwell-Jolly, et al*, -- F. Supp. --, 2009 WL 2941519
17 [N.D. Cal], at 9.) For example, whether or not, as Defendants claim in their Motion,
18 regional centers have funds or will back fill IHSS cuts, is again within the knowledge
19 of the Defendants. It is the California Department of Developmental Services which
20 directly contracts with regional centers to provide services to clients. (Cal. Welfare
21 Inst. Code Sections 4620 *et seq.* and 4640 *et seq.*) Plaintiffs do not have information
22 about what state-funded entities, such as the regional centers, will be providing in the
23 way of alternative resources and their depositions on this topic will be fruitless. The
24 record shows that alternative services are already overburdened and that class
25 members lack information about these services. See Baran Decl. ¶ 26 (Doc No. 63)
26 (for most clients there are no other options besides IHSS, very limited number of
27
28

1 Medi-Cal covered nursing home placements within the county); Calame Decl. ¶ 8
2 (Doc. No. 64) (gap left by withdrawal of IHSS services “cannot be filled”); Collins
3 Decl. ¶ 31 (Doc. No. 65) (other county services such as Adult and Child Protective
4 Services “will not be able to handle the sudden influx of IHSS recipients); Hill Decl.
5 ¶ 7 (Doc. No. 75) (ABX4 4 cuts come concurrent with cuts to county outpatient
6 mental health care services, so that program will not be able to absorb those cut from
7 IHSS); Nicco Decl. ¶ 38 (Doc. No. 80) (social services network in San Francisco does
8 not have capacity to compensate for loss of IHSS services); Anderson Decl. ¶ 11
9 (Doc. No. 43) (ten days would be insufficient to arrange alternative means of care);
10 Addison Decl. ¶ 8 (Doc. No. 61) (same).

12 Additionally, the existence of alternate resources is irrelevant to many of
13 Plaintiffs’ claims. For example, Plaintiffs’ claim that the notice of action the State
14 intends to send out does not provide meaningful notice because it does not adequately
15 apprise class members of the basis for their termination and provide them with an
16 adequate opportunity to challenge any errors does not depend on the existence or
17 nonexistence of alternative resources. Similarly, the existence or non-existence of
18 alternative resources is not relevant to whether Defendants are violating the Medicaid
19 Act by using a wholly irrational and arbitrary system to decide whose benefits should
20 be terminated or reduced, or are violating the Americans with Disabilities Act and
21 Section 504 by disproportionately terminating and reducing IHSS services for
22 individuals with mental (as opposed to physical) disabilities.
23
24

25 In fact, if these issues are determined to be relevant at this stage of the
26 proceeding, Plaintiffs are the ones who will need to take the depositions of the
27 Defendants to ascertain what services are available and what steps the state is taking,
28

1 directly or through its agents, to make alternative services available under the Medi-
 2 Cal program or other state programs, such as the Lanterman Act.

3 C. Proffered Reasons 3 and 4: There is no need to take the depositions of the named
 4 Plaintiffs to determine whether the proposed cuts will place class members at risk of
 5 harm or unnecessary out-of-home placement.
 6

7 Finally, discovering the “effect of any reduction or termination” on Plaintiffs
 8 or their “risk of out-of-home placement” is similarly not a compelling reason to order
 9 that these depositions take place at this time. Plaintiffs rely not on their individual
 10 predicaments alone to show the irreparable harm and risk of institutionalization that
 11 proposed terminations and reductions in IHSS services will bring -- but instead on the
 12 dozens of declarations filed by stake holders, experts, providers and County IHSS
 13 offices which demonstrate harm to thousands of recipients. See declarations cited in
 14 Memorandum of Points and Authorities in Support of Motion for Temporary
 15 Restraining Order (Doc. No. 16), at Argument 1.A. Defendants cannot claim that the
 16 deposition of a handful of Plaintiffs and/or their Guardian Ad Litem is necessary to
 17 contest the Preliminary Injunction motion.

18 To the extent that Defendants insist on seeking such information, mutual
 19 discovery is necessary. Plaintiffs would wish to depose a number of Defendants’
 20 staff and agents as to what they will be doing to avoid such harm as a result of the
 21 terminations and reductions in services. It would be almost impossible to complete
 22 that discovery within 1 week.

23 **III. ONE WEEK IS INSUFFICIENT TIME TO ARRANGE AND PREPARE FOR**
 24 **DEPOSITIONS OF NAMED PLAINTIFFS, PARTICULARLY IN LIGHT OF THE**
 25 **FACT THAT THEY ARE INDIVIDUALS WITH SIGNIFICANT DISABILITIES**

26 Plaintiffs are elderly or have mental disabilities, and/or their Guardian Ad Litem have
 27 responsibilities for caring for their children with disabilities. See Section I, *supra*. Thus, there is
 28 insufficient time, within the next few days, to prepare for and make arrangements for the depositions
 of Plaintiffs and their Guardian Ad Litem. Preparation of Plaintiffs, who have significant

1 disabilities, is complicated by the fact that Defendants provided Plaintiffs with no information about
 2 how IHSS terminations and reductions would be conducted until October 1 and Plaintiffs have yet to
 3 receive actual notification regarding cuts to their services. Additionally, a few days is not sufficient
 4 time to make the accommodations that Plaintiffs need at their depositions, including transportation,
 5 providing for their attendant care coverage and medical concerns, and covering child care for
 6 Guardian parents. (Lagahid Decl. ¶ 11 (Doc. No. 34) (mother, who is the *guardian ad litem*, has
 7 extensive physical disabilities and uses a wheelchair); Sheppard Decl. ¶¶ 3, 4, 6 (Doc. No. 37)
 8 (cannot go into community without IHSS provider who comes only twice a week for four hours, has
 9 fluctuating health due to medical conditions and uses a wheelchair); Rivera Decl. ¶ 6, 11, 44 (Doc.
 10 No. 38) (mother, who is the primary caregiver for Plaintiff C.R., has two other young children, C.R.
 11 cannot walk or talk); Jones Decl. ¶ 9 (Doc. No. 39) (has difficulty walking due to neuropathy); Oster
 12 Decl. ¶ 4, 6 (Doc. No. 35) (has fluctuating mental health needs and need for medication). While
 13 these arrangements are possible with the requisite planning, an expedited schedule will prejudice
 14 Plaintiffs and class members.

15 **IV. CONCLUSION**

16 For all the above reasons, Plaintiffs request that this Court deny Defendants' motion for
 17 limited discovery or grant temporary restraining order enjoining the proposed terminations and
 18 reductions in benefits, and then set a reasonable schedule for mutual, limited discovery prior to the
 19 hearing for preliminary injunction.

20 Date: October 6, 2009

Respectfully submitted,

21 */s/ Dara L. Schur*

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