

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

DAVID OSTER, et al.,  
Plaintiffs,  
v.

No. C 09-4668 CW  
ORDER GRANTING  
PLAINTIFFS'  
REQUEST FOR A  
PRELIMINARY  
INJUNCTION  
(Docket No. 328)

WILL LIGHTBOURNE, Director of the  
California Department of Social  
Services; TOBY DOUGLAS, Director  
of the California Department of  
Health Care Services; CALIFORNIA  
DEPARTMENT OF HEALTH CARE  
SERVICES; and CALIFORNIA  
DEPARTMENT OF SOCIAL SERVICES,  
Defendants.

\_\_\_\_\_ /

This case concerns the validity of ABX4 4, a law passed in July 2009 that tightens the eligibility criteria for participants in California's In-Home Supportive Services (IHSS) Program, and SB 73, a more recently enacted law that also aims to cut the IHSS program, although in a different way. Plaintiffs are IHSS recipients, and unions that represent IHSS providers. On October 19, 2009, this Court entered a preliminary injunction to block implementation of ABX4 4, followed on October 23, 2009 by a written opinion explaining the grounds for the injunction. On December 1, 2011, Plaintiffs moved for a temporary restraining order and a preliminary injunction barring implementation of SB

1 73. Having considered all of the parties' submissions and oral  
2 argument, the Court grants Plaintiffs' request for a second  
3 preliminary injunction.

4 BACKGROUND

5 The Court's 2009 opinion provides a detailed explanation of  
6 the facts underlying this action. The present order briefly  
7 summarizes the facts relevant to the pending request for a  
8 preliminary injunction.  
9

10 The IHSS program is part of California's Medi-Cal program,  
11 which provides medical services to eligible beneficiaries and is  
12 supported through a combination of state, federal and county  
13 funding. Federal funds are provided through the Medicaid Act.  
14 The IHSS program provides supportive services to the "aged, blind,  
15 or disabled persons . . . who are unable to perform the services  
16 themselves and who cannot safely remain in their homes or abodes  
17 of their own choosing unless these services are provided." Cal.  
18 Welf. & Inst. Code § 12300(a). At the time the present motion was  
19 filed, there were 440,000 IHSS recipients. Approximately sixty  
20 percent of IHSS recipients are senior citizens.  
21

22 The Manual of Policies and Procedures (MPP) for Defendant  
23 California Department of Social Services (CDSS) requires  
24 "assistance to those eligible aged, blind and disabled individuals  
25 who are unable to remain safely in their own homes without this  
26 assistance." MPP § 30-700.1. The MPP also states that a  
27 particular service will not be authorized unless the social worker  
28

1 evaluating the individual "has determined that the recipient would  
2 not be able to remain safely in his/her own home without IHSS" and  
3 "[p]erformance of the service by the recipient would constitute  
4 such a threat to his/her health/safety that he/she would be unable  
5 to remain in his/her own home." Id. § 30-761.13-14.

6 Prior to the enactment of ABX4 4 and SB 73, the CDSS had  
7 developed and implemented a Uniformity Assessment System to ensure  
8 that IHSS recipients with comparable needs for assistance receive  
9 comparable services. The tool defined ranks of one to five for  
10 social workers to use in rating elderly or disabled individuals'  
11 functional abilities in fourteen areas: housework; laundry;  
12 shopping and errands; meal preparation and clean up; mobility  
13 inside the residence; bathing and grooming; dressing; bowel,  
14 bladder and menstrual care; transfer from one position to another;  
15 eating; respiration; memory; orientation; and judgment. The  
16 parties refer to the rating for each category as a "functional  
17 rank." Rank one, the highest functional level, indicates that a  
18 recipient is able to function independently in that category,  
19 without human assistance although perhaps with difficulty. Rank  
20 two applies if a recipient is able to perform the function, but  
21 needs verbal assistance, such as reminders. Ranks three and four  
22 apply if a recipient can perform the function with some or  
23 substantial human assistance, respectively, including but not  
24 limited to direct physical assistance. Rank five is applied to a  
25  
26  
27  
28

1 recipient who cannot perform the function, with or without human  
2 assistance.

3 Social workers are required to assess each recipient's  
4 functional rank in the fourteen areas on an individualized basis,  
5 only for the purpose of determining with uniformity the number of  
6 hours of a particular service a recipient needs. Time guidelines  
7 are provided for each rank for tasks for which IHSS recipients may  
8 receive services. Once it is determined that an IHSS recipients  
9 needs a given service to remain safely at home, the number of IHSS  
10 hours authorized is determined by the guidelines, unless there is  
11 a documented reason for an exception. MPP § 30-757.1(a)(6).

12  
13 Nonetheless, the eligibility restrictions implementing ABX4 4  
14 were based on those functional ranks, as well as on a Functional  
15 Index (FI) Score, a composite score calculated based on a weighted  
16 average of eleven of the recipient's functional rankings,  
17 excluding the rankings for the mental tasks of memory, orientation  
18 and judgment. As explained in the 2009 order enjoining  
19 implementation of ABX4 4, neither functional ranks nor the  
20 Functional Index had ever been used to determine IHSS eligibility.

21  
22 On June 30, 2011, SB 73 enacted California Welfare and  
23 Institutions Code section 12301.07, mandating that the CDSS reduce  
24 authorized hours of services for IHSS recipients by twenty percent  
25 if, by December 15, 2011, it were forecasted that certain specific  
26 revenue targets would not be met. On November 29, 2011, after it  
27 appeared that the revenue targets would not be met, triggering the  
28

1 cuts to the IHSS program, the CDSS issued an All-County Letter  
2 (ACL) to inform counties of the requirements under new section  
3 12301.07 and its plan for implementation of the SB 73 mandated  
4 cuts. Declaration of Eileen Carroll, Ex. A.

5 The implementation plan for SB 73 established in the ACL is  
6 as follows. Certain groups of recipients are exempted from the  
7 twenty percent reductions. The reduction would not be applied to  
8 "individuals receiving IHSS who also receive services under one of  
9 the State Home and Community Based Services Waivers, including the  
10 following: Acquired Immune Deficiency Syndrome (AIDS) Waiver, Home  
11 and Community Based Services Waiver for the Developmentally  
12 Disabled (HCBS-DD), In-Home Operations (IHO), Multipurpose Senior  
13 Services Program (MSSP), and Nursing Facility/Acute Hospital  
14 (NF/AH)." ACL at 2. These exemptions appear to implement section  
15 12301.07(a)(5), which states that the reduction in IHSS hours  
16 "shall not apply to in-home support services recipients who also  
17 receive services under Section 9560, subdivision (t) of Section  
18 14132, and Section 14132.99." Over a thousand individuals are on  
19 waiting lists for these programs, but they would not be exempted.<sup>1</sup>

20  
21  
22 The ACL also announced that recipients who met one of the  
23 following criteria were pre-approved for an exemption from the  
24 reduction: (1) if the recipient had a functional rank of five for  
25 mobility inside; bowel, bladder and menstrual care; transfer, or  
26

---

27 <sup>1</sup> Plaintiffs' unopposed Third Request for Judicial Notice is  
28 granted with respect to Exhibits 11 and 12.

1 paramedical services authorized for bed sore care; and eating;  
2 (2) the recipient was authorized for 283 hours per month, the  
3 statutory maximum; or (3) the recipient was assessed for  
4 protective supervision. ACL at 3-4. Section 12301.07(b) requires  
5 the CDSS and counties to develop a process to allow counties to  
6 "preapprove IHSS Care Supplements described in subdivision (f), to  
7 the extent that the process is permissible under federal law."  
8

9 The ACL explains that the CDSS will identify, through its  
10 Case Management Information and Payrolling System (CMIPS), all  
11 recipients in the exempt groups, under section 12301.7(a)(5), and  
12 the groups pre-approved for an exemption to the twenty percent  
13 reduction, pursuant to section 12301.07(b). ACL at 3. The exempt  
14 and pre-approved recipients would receive an "IHSS Program Notice  
15 to Recipient of Exemption from Reduction in Service Hours." All  
16 other recipients, who would be subject to the reduction, would  
17 receive a notice of action advising them of the reduction. ACL at  
18 3.  
19

20 The ACL sets forth a process by which recipients who receive a  
21 notice of action may request a restoration of all or part of their  
22 reduced hours by submitting an application for the Care Supplement  
23 that SB 73 provided. The Supplemental Care application requires a  
24 recipient to provide a written explanation of "how the 20-percent  
25 reduction in your authorized service hours would put you at serious  
26 risk of out-of-home placement." Carroll Dec. at 18. See also,  
27 Cal. Welf. & Inst. Code § 12301.07(f). Section 12301.07(c) further  
28

1 states, "The notice of action informing each recipient who is not  
2 preapproved for an IHSS Care Supplement pursuant to subdivision (b)  
3 shall be mailed at least 15 days prior to the reduction."

4 If a recipient submits the Supplemental Care application to  
5 the county within fifteen days of receipt of the notice of action,  
6 the county shall reinstate the reduced hours pending its  
7 determination of whether the recipient would be at serious risk of  
8 out-of-home placement as a result of the reduction. ACL at 6. If  
9 the recipient submits the Supplemental Care application more than  
10 fifteen days after the recipient receives the notice of action, the  
11 reduction is imposed while the county makes its determination. Id.

12 When the county receives a completed application for IHSS  
13 Supplemental Care, a worker is required to complete a Supplemental  
14 Care Worksheet to decide if the applicant qualifies. The  
15 worksheet purports to determine whether the recipient is "at  
16 serious risk of out-of-home placement" as a result of the twenty  
17 percent reduction. Carroll Dec. at 20, Supplemental Care  
18 Worksheet, ACL at Attachment H. Parts A and B of the worksheet  
19 outline two different tests to determine whether a recipient has  
20 met the standard. Under Part A, a recipient qualifies as being at  
21 serious risk if three or more of the following categories are  
22 satisfied.  
23  
24

- 25 1. Paramedical Services authorized to monitor medical  
26 condition and/or give injections
  - 27 2. Ranked 4 or 5 for Mobility Inside
- 28

- 1 3. Ranked 4 or 5 for Bathing and Grooming
- 2 4. Ranked 4 or 5 for Dressing
- 3 5. Ranked 3, 4 or 5 for Bowel, Bladder and Menstrual
- 4 Care, or Paramedical Services authorized for catheter
- 5 or colostomy care
- 6 6. Ranked 4 or 5 for Transfer or Paramedical Services
- 7 authorized for bed sore care
- 8 7. Ranked 3, 4 or 5 for Eating
- 9 8. Ranked 5 for Respiration

9 Id.

10 Alternatively, under Part B of the worksheet, a recipient  
11 qualifies as being at serious risk of out-of-home placement if the  
12 functional ranks in the categories of memory, orientation and  
13 judgment total seven or more. Id. In contrast to the exempt and  
14 pre-approved groups, even recipients who are presumptively  
15 eligible for a restoration of hours based on Part A or B of the  
16 worksheet will receive notice and a reduction of their service  
17 hours.  
18

19 The next portion of the worksheet, Part C, is titled, "IHSS  
20 Supplemental Care Request Disposition." Id. Importantly, Part C  
21 may only be completed "if recipient/applicant is determined to be  
22 at serious risk" of out-of-home placement based on Part A or B.  
23 Part C requires the worker to note that the recipient is  
24 nonetheless not at serious risk for out-of-home placement because  
25 the recipient has changed "the assignment of tasks," has  
26 alternative resources to provide specified essential services, or  
27  
28

1 has had the number of hours partially or fully restored. Id. The  
2 ACL explains that by changing the assignment of tasks, the use of  
3 IHSS hours is prioritized for "the most essential tasks." ACL at  
4 7. However, it is not explained how eliminating the hours for  
5 lower priority tasks will alleviate the risk, if even the lower  
6 priority tasks are necessary to ensure that the recipient is able  
7 to remain safely at home.

8  
9 Notice of the reduction and the Supplemental Care application  
10 process, as described in the ACL, consists of the following mailed  
11 items: (1) a one page notice of action, consisting of a single  
12 paragraph, (2) a letter intended to explain the reason for the  
13 cuts and to inform recipients of their option to seek a  
14 restoration of hours through the Supplemental Care application  
15 process, (3) the Supplemental Care application and, (4) a form to  
16 request a state hearing.

17  
18 The CDSS has drafted four different versions of the notice of  
19 action to account for factors that are not relevant here. All  
20 versions of the notice of action include the following language:

21 Because of a new state law, your total monthly  
22 authorized hours will be reduced by twenty-percent from  
23 ###.## to ###.##. (W&IC section 12301.07). See insert  
for information about the new law.

24 ACL at 10.

25 The explanation letter is printed in Arial, a non-serif font,  
26 with a font size of less than 14 point. The letter states,  
27  
28

**PLEASE READ THIS NOTICE CAREFULLY  
IT PROVIDES IMPORTANT INFORMATION ABOUT YOUR IHSS**

Beginning January 1, 2012, the total authorized monthly service hours you get will be reduced by 20-percent. Here's why:

There is a new state law (Welfare and Institutions Code section 12301.07) that requires the California Department of Social Services to make a 20-percent reduction in each IHSS recipient's total authorized monthly service hours. The enclosed Notice of Action shows how many authorized monthly service hours you get now and how many you will get after the reduction.

The 20-percent reduction is in addition to the 3.6-percent reduction in your authorized monthly service hours that took effect February 1, 2011, and which will continue until June 30, 2012.

You can decide which of your authorized services will be reduced. You can choose to reduce all of the hours from one authorized service or you can split it up among several different authorized services. Your provider(s) will receive notification about the 20-percent reduction on his/her timesheet(s). However, you are responsible for telling your provider(s) which specific service hours you have chosen to reduce. You do not have to tell the county how you have chosen to apply the reduction; this is between you and your provider(s).

If you believe that the 20-percent reduction in your authorized service hours puts you at serious risk of out-of-home placement, you can ask for IHSS Supplemental Care. You must complete the enclosed IHSS Application for Supplemental Care (SOC 877) and return it to the county by March 1, 2012. The county will review your application and determine whether you are at serious risk of out-of-home placement. If the county determines that you are at serious risk of out-of-home placement, your service hours may be partially or fully restored.

If you ask for IHSS Supplemental Care within 15 days of receiving this notice or mail it to the county postmarked no later than **January 3, 2012**, the reduction in your service hours will not go into effect and you will continue to get the same number of authorized service hours you have been getting until the county determines if you are at serious risk of out-of-home placement. If the county determines that you are at serious risk of out-of-home placement, your service hours may not be reduced at all or they may be reduced less than 20-percent.

The county will send you a notice telling you if your application for IHSS Supplemental Care has been approved or

1 denied. If you disagree with the county's decision, you can  
2 request a state hearing on that decision. Information about  
3 your hearing rights is included on the back of this notice.  
4 However, requests for a state hearing only to dispute the  
5 new state law requiring the 20-percent reduction in  
6 authorized service hours will be dismissed.

7 If you do not understand the information in this notice or  
8 you have any questions, contact your county IHSS office.

9 ACL Attachment A (TEMP 2257) (emphasis in original).

10 The notices and forms are to be translated into Armenian,  
11 Chinese and Spanish. ACL at 4. The ACL notes that each county is  
12 required generally to provide bilingual/interpretive services and  
13 written translations to non-English or limited-English proficient  
14 populations, as mandated by the Dymally Alatorre Bilingual  
15 Services Act, Government Code section 7290 et seq., and by state  
16 regulation, MPP Division 20, section 115. However, these mandates  
17 do not prescribe specific requirements as to how each county is to  
18 provide such assistance in the course of implementing the  
19 reductions under SB 73 or how IHSS recipients are to be informed  
20 of the availability of such assistance. The ACL does not provide  
21 for notification targeted to reach IHSS recipients who are  
22 visually impaired, cannot read or have mental impairments that  
23 thwart their ability to understand and respond to the notice.

24 Plaintiffs have submitted extensive evidence relevant to  
25 their likelihood of success on the merits and the irreparable harm  
26 to class members. Testimony by Charles Thurman and Helen Polly  
27 Stern is indicative of class members' vulnerabilities based on the  
28 service cuts.

1 Charles Thurman is a seventy-one year old resident of Shasta  
2 County who has received IHSS since 2006. Mr. Thurman, who was  
3 born blind, has had diabetes for several years, resulting in  
4 numbness, known as neuropathy, in his hands and feet. He has  
5 Chronic Obstructive Pulmonary Disease, a condition that  
6 contributes to weakness and shortness of breath. Mr. Thurman has  
7 coronary heart disease and high blood pressure, and has had four  
8 stents put in his coronary arteries to help blood circulate in his  
9 body. Finally, flattened discs and damaged vertebrae in Mr.  
10 Thurman's back cause difficulty and pain in reaching, grasping,  
11 lifting and standing for prolonged periods of time. Mr. Thurman  
12 can only walk a few steps and is at risk for falls. Outside he  
13 uses an electric wheelchair.  
14

15 Mr. Thurman has fallen twice during the past year. Once, he  
16 broke his arm and toe. The second time, he fell down on the front  
17 patio while he was trying to get out of his wheelchair. Mr.  
18 Thurman's wife had to call 911 for assistance in lifting him up.  
19 The numbness in Mr. Thurman's hands impedes his ability to shave  
20 safely and properly groom himself. He is also unable to cook and  
21 clean extensively.  
22

23 Mr. Thurman's wife is sixty-five, cannot read, and is also  
24 disabled, having suffered several small heart attacks and endured  
25 a quadruple heart bypass. She is unable to lift items weighing  
26 more than five pounds and cannot lift her arms over her head  
27  
28

1 without risking a heart attack. Mrs. Thurman is also an IHSS  
2 recipient.

3 Mr. and Mrs. Thurman share a single IHSS care provider who  
4 provides a number of services which help them continue to live  
5 independently in their mobile home. The provider handles domestic  
6 chores, including cooking, cleaning and laundry, assists Mr.  
7 Thurman with grooming, and takes the couple to their doctors'  
8 appointments, shopping and on other errands. Mr. Thurman  
9 currently receives 31.17 hours of IHSS care per month. If his  
10 IHSS hours are cut by twenty percent, he will lose 6.23 hours. As  
11 it is, the provider struggles to carry out all of the required  
12 assistance in the time period allotted. On occasion, the provider  
13 has had to postpone grocery shopping or leave certain domestic  
14 tasks incomplete due to the lack of time. As a result, Mr. and  
15 Mrs. Thurman have gone without fresh food and relied upon less  
16 nutritious microwaveable meals. In addition, a dustier, dirtier  
17 home exacerbates their pulmonary problems. They are at risk of  
18 falling as they try to take on certain tasks to make up for the  
19 lack of IHSS assistance.  
20  
21

22 Helen Polly Stern is eighty-six years old, and has received  
23 IHSS since 2009. Ms. Stern is physically disabled. She has  
24 bilateral hip dysplasia, which is the deformation of the hip  
25 joints, as well as osteoarthritis and osteoporosis. The limbs on  
26 the right side of her body are shorter than the limbs on her left  
27  
28

1 side. Ms. Stern has undergone numerous operations to treat this  
2 condition.

3 Ms. Stern also suffers from cardiovascular, skin and bladder  
4 problems. When she was fifty-eight she developed congestive heart  
5 failure. She has had surgeries to remove blood clots from her  
6 legs. She has poor circulation and edema--water retention--below  
7 the skin of her legs resulting in painful swelling. She is prone  
8 to rashes, as well. In the past, the edema and skin outbreaks  
9 have led to open wounds and oozing sores. Ms. Stern underwent  
10 skin grafting on her left leg to treat the problems. Through the  
11 routine assistance provided by IHSS these problems have been  
12 brought under control. Ms. Stern also suffers from chronic  
13 inflammation of the bladder wall and frequent urinary tract  
14 infections. She regularly experiences urinary incontinence.  
15

16 Ms. Stern's IHSS provider gives assistance for bowel and  
17 bladder care, bathing, oral hygiene and grooming. This assistance  
18 is critical due, in part, to Ms. Stern's incontinence and serious  
19 skin problems. Ms. Stern requires frequent undressing and  
20 redressing due to her accidents, which occur several times per  
21 week. Ms. Stern cannot wear diapers or incontinence pads during  
22 the day because of her skin problems. The provider also prepares  
23 three meals a day for Ms. Stern, assists her in her wheelchair,  
24 takes her to medical appointments, and does the shopping and  
25 household chores. Ms. Stern is authorized to receive 126.1 hours  
26 of IHSS care per month, but since 2010, due to a 3.6 percent cut,  
27  
28

1 she has received 121.6 hours of care per month, approximately four  
2 hours per day, seven days per week. Ms. Stern's provider,  
3 however, normally stays five hours per day, even though she is  
4 paid only for four hours. The provider works two shifts, one in  
5 the morning and another in the evening.

6 A twenty percent reduction in Ms. Stern's IHSS hours would  
7 undermine her ability to maintain a hygienic and healthy home and  
8 to keep her skin problems under control. If Ms. Stern's IHSS  
9 hours are cut by twenty percent, her provider will likely need to  
10 find another job, interfering with her ability to work two shifts  
11 and provide a free hour of service each day.

12 Plaintiffs allege eight claims in their Third Amended  
13 Complaint. The first claim alleges that the notices Defendants  
14 propose to send to IHSS recipients are inadequate under  
15 constitutional due process standards. The second claim alleges  
16 that ABX4 4 and SB 73 deprive IHSS recipients of their right to  
17 notice and a pre-termination hearing in violation of the provision  
18 of the Medicaid Act establishing right to a fair hearing. The  
19 third and fourth claims allege that ABX4 4 and SB 73 violate the  
20 Americans with Disabilities Act (ADA) and section 504 of the  
21 Rehabilitation Act of 1973, respectively. The fifth, sixth and  
22 seventh claims allege that both state enactments violate the  
23 comparability, sufficiency and reasonable standards requirements  
24 of the Medicaid Act.  
25  
26  
27  
28

## LEGAL STANDARD

1  
2 "A plaintiff seeking a preliminary injunction must establish  
3 that he is likely to succeed on the merits, that he is likely to  
4 suffer irreparable harm in the absence of preliminary relief, that  
5 the balance of equities tips in his favor, and that an injunction  
6 is in the public interest." Winter v. Natural Res. Def. Council,  
7 Inc., 555 U.S. 7, 20 (2008).

8  
9 Alternatively, "a preliminary injunction could issue where  
10 the likelihood of success is such that serious questions going to  
11 the merits were raised and the balance of hardships tips sharply  
12 in plaintiff's favor," so long as the plaintiff demonstrates  
13 irreparable harm and shows that the injunction is in the public  
14 interest. Alliance for the Wild Rockies v. Cottrell, 632 F.3d  
15 1127, 1131 (9th Cir. 2011) (citation and internal quotation and  
16 editing marks omitted).

17  
18 A court employs a sliding scale when considering a  
19 plaintiff's showing as to the likelihood of success on the merits  
20 and the likelihood of irreparable harm. Id. "Under this  
21 approach, the elements of the preliminary injunction test are  
22 balanced, so that a stronger showing of one element may offset a  
23 weaker showing of another." Id.

## DISCUSSION

## I. Likelihood of Success on the Merits

## A. Standing

Defendants contend that all Plaintiffs lack standing. In every federal case, the court must make a threshold determination of standing. Warth v. Seldin, 422 U.S. 490, 498 (1975). "The question of standing 'involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.'" Bennett v. Spear, 520 U.S. 154, 162 (1997) (quoting Warth, 422 U.S. at 498). To satisfy the case or controversy requirement of Article III, which is the "irreducible constitutional minimum" of standing, a plaintiff must have suffered (1) an injury in fact, (2) that is fairly traceable to the actions of the defendant, such that (3) if a favorable court decision were rendered, it is likely the injury would be redressed. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). An "injury in fact" is more than an injury to a cognizable interest; to satisfy this requirement, the injury must be concrete and particularized. Id. According to the Lujan court, "particularized" means that the injury must have affected the plaintiff "in a personal and individual way." Id. at 560 n.1.

In addition to the immutable, constitutional requirements of Article III, "the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing." Valley Forge v. Americans United, 454 U.S. 464, 474-75 (1982).

1 Among these prudential limits is the doctrine that a plaintiff's  
2 grievance must arguably fall within the zone of interests  
3 protected or regulated by the statute invoked in the suit. Allen  
4 v. Wright, 468 U.S. 737, 751 (1984); Valley Forge, 454 U.S. at  
5 474-75. Another prudential limit is the principle that the  
6 plaintiff "generally must assert his own legal rights and  
7 interests, and cannot rest his claim to relief on the legal rights  
8 or interests of third parties." Warth, 422 U.S. at 499.

9  
10 Where one party has standing to pursue the claims at issue, a  
11 court need not separately analyze whether other parties have  
12 standing to sue. Brown v. City of Los Angeles, 521 F.3d 1238,  
13 1240 n.1 (9th Cir. 2008) ("[T]he presence in a suit of even one  
14 party with standing suffices to make a claim justiciable."); Bates  
15 v. United Parcel Serv., Inc., 511 F.3d 974, 985 (9th Cir. 2007)  
16 (en banc) ("[W]e consider only whether at least one named  
17 plaintiff satisfies the standing requirements . . . .").

18  
19 First, Defendants argue that named Plaintiffs Oster, Jones,  
20 C.R. and L.C. lack standing to pursue any of their claims because  
21 they are exempt from SB 73's reduction in hours. Plaintiffs agree  
22 that Plaintiffs Oster, Jones and C.R. lack standing with respect  
23 to the claims based on SB 73. However, Plaintiffs Oster, Jones  
24 and C.R. have standing to pursue claims based on ABX4 4.

25  
26 Defendants assert that L.C. lacks standing as an individual  
27 and as a representative of a subclass pursuing claims on behalf of  
28 present or future IHSS recipients who are under the age of twenty-

1 one, who are entitled to the protections of the Early Periodic  
2 Screening Diagnosis and Treatment (EPSDT) provisions, and have or  
3 will receive notice of service cuts pursuant to SB 73. Eileen  
4 Carroll, Deputy Director of the Adult Programs Division of the  
5 CDSS, attested that all IHSS recipients who receive EPSDT services  
6 are pre-approved for exemption from the reduction in services.  
7 However, Ms. Carroll's declaration was drafted for purposes of  
8 this litigation. There is no indication that the EPSDT exemption  
9 is legally binding on the counties by virtue of statutory or  
10 regulatory law or otherwise. Therefore, it appears that L.C. may  
11 be subject to cuts based on SB 73 and has standing.

12  
13 Defendants argue that the claims of named Plaintiffs Stern,  
14 Thurman and Hylton are not ripe because they may request  
15 restoration of their hours by applying for Supplemental Care.<sup>2</sup>  
16 "[T]he possibility of future injury may be sufficient to confer  
17 standing . . . [A] credible threat of harm is sufficient to  
18 constitute actual injury for standing purposes." Cent. Delta  
19 Water Agency v. United States, 306 F.3d 938, 946, 950 (9th Cir.  
20 2002). Unless enjoined, the reductions here will be automatically  
21 applied. Named Plaintiffs Stern, Thurman and Hylton will be  
22 notified that their IHSS hours will be reduced. The injury is the  
23 notice and reduction of IHSS hours, not the denial of a  
24  
25

---

26  
27 <sup>2</sup> Defendants also make this argument with respect to named  
28 Plaintiff Sheppard, but Plaintiffs no longer propose him as a  
class representative. Docket No. 195.

1 recipient's request for restoration of hours. Defendants rely  
2 upon Summar H. v. Fukino, 2009 WL 1249306 (D. Haw.), but that  
3 decision is not binding on this Court and is not persuasive in  
4 light of controlling Ninth Circuit authority.

5 The present dispute is appropriate for adjudication, even  
6 under the standard for prudential ripeness that Defendants cite:  
7 (1) the fitness of the issues for judicial decision; and (2) the  
8 hardship to the parties of withholding court consideration. See  
9 Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433  
10 F.3d 1199, 1211 (9th Cir. 2006). Plaintiffs' challenge to cuts  
11 mandated by SB 73 is not abstract. The fact that some  
12 Supplemental Care applications may be granted to restore hours for  
13 individual IHSS recipients does not defeat the ripeness of the  
14 dispute Plaintiffs have presented.

15  
16 Next, Defendants argue that Union Plaintiffs lack Article III  
17 standing. Union Plaintiffs respond that they satisfy the  
18 requirements for associational standing. "[A]n association has  
19 standing to bring suit on behalf of its members when: (a) its  
20 members would otherwise have standing to sue in their own right;  
21 (b) the interests it seeks to protect are germane to the  
22 organization's purpose; and (c) neither the claim asserted nor the  
23 relief requested requires the participation of individual members  
24 in the lawsuit." Hunt v. Wash. State Apple Adver. Comm'n, 432  
25 U.S. 333, 343 (1977).  
26  
27  
28

1 Defendants assert that Union Plaintiffs have not established  
2 that any of their members would have standing to sue in their own  
3 right. However, Laura Soto is a member of Plaintiff United  
4 Domestic Workers of America, AFSCME, Local 3930, AFL-CIO (UDW),  
5 and provides IHSS services to named Plaintiff Hylton, who will  
6 receive a notice of a twenty percent reduction in her hours.  
7 Declaration of Laura Soto, Docket No. 481, at ¶¶ 1-2; Second  
8 Declaration of Gary Voice, Docket No. 485, at ¶ 19;<sup>3</sup> Second  
9 Declaration of Andrea Hylton, Docket No. 371, at ¶ 22. Similarly,  
10 Katie Phillips, another UDW member, provides IHSS services to her  
11 adult son, who suffers from paranoid schizophrenia and depression.  
12 Declaration of Katie Phillips, Docket No. 393, at ¶¶ 2-3; Voice  
13 Dec. at ¶ 19. Ms. Phillips' son faces a twenty percent reduction  
14 in hours, which will adversely impact Ms. Phillips. Phillips Dec.  
15 at ¶ 22. Ms. Soto and Ms. Phillips have standing to sue in their  
16 own right because they will suffer economic harm as a result of  
17 the reductions. See Independent Living Ctr. v. Shewry, 543 F.3d  
18 1050, 1065 (9th Cir. 2008) ("Petitioners include independent  
19  
20

21  
22 <sup>3</sup> The Soto and Voice declarations were submitted in support  
23 of Plaintiffs' reply brief. Defendants objected to the submission  
24 of new evidence in connection with the reply, but both  
25 declarations directly respond to standing issues that Defendants  
26 raised in their opposition. Furthermore, Defendants' specific  
27 objection to the Soto declaration did not address the testimony  
28 cited here. Defendants did not specifically object to the Voice  
Declaration, although they stated that they did not have  
sufficient time to review all of the declarations. Federal Rules  
of Evidence 402, 602, 701, 702 and 802 do not require the  
exclusion of Mr. Voice's testimony. Defendants' objections are  
overruled.

1 pharmacies and health care providers participating in the State's  
2 Medi-Cal program that, according to their complaint, will be  
3 'directly injured, by loss of gross income' when the ten-percent  
4 rate reduction takes effect.").

5 Contrary to Defendants' argument, Union Plaintiffs' claims in  
6 this litigation are also germane to their organizational  
7 interests. Union Plaintiffs represent IHSS providers who are  
8 seeking to prevent the reduction of IHSS benefits, which will, in  
9 turn, lessen the amount of work available to their members. Union  
10 Plaintiffs and IHSS recipients have a mutual interest in the  
11 success of the litigation. From the beginning of this lawsuit,  
12 the joint goal of all Plaintiffs has been to ensure that IHSS  
13 recipients receive the services that they need to remain safely in  
14 their homes.

15  
16 The third factor under Hunt is satisfied because the  
17 participation of individual members is not necessary in suits that  
18 seek only prospective, injunctive relief, rather than damages.  
19 United Food and Commercial Workers v. Brown Group, Inc., 517 U.S.  
20 544, 554 (1996) (third Hunt prong precludes standing "when an  
21 organization seeks damages on behalf of its members.");  
22 International Union v. Brock, 477 U.S. 274, 287 (1986) (union has  
23 standing to challenge government's interpretation of Trade Act,  
24 where suit sought no damages and thus did not entail  
25 "individualized proof."). Thus, Union Plaintiffs' members need  
26  
27  
28

1 not be joined as parties in order for Union Plaintiffs to have  
2 associational standing.

3 Defendants, citing Hodgers-Durgin v. de la Vina, 199 F.3d  
4 1037, 1045 (9th Cir. 1999), also argue that Union Plaintiffs lack  
5 standing because the claims asserted and relief requested require  
6 the demonstration of injury to a named union member Plaintiff.  
7 Unlike the class in Hodgers, Plaintiffs in this case do not invoke  
8 injury merely to unnamed Plaintiffs for the purpose of  
9 establishing Article III standing. Furthermore, the Ninth Circuit  
10 recently reiterated, "An organization may establish a sufficient  
11 injury in fact if it substantiates by affidavit or other specific  
12 evidence that a challenged statute or policy frustrates the  
13 organization's goals and requires the organization 'to expend  
14 resources in representing clients they otherwise would spend in  
15 other ways.'" Comite de Jornaleros de Redondo Beach v. City of  
16 Redondo Beach, 657 F.3d 936, 943 (9th Cir. 2011) (citing El  
17 Rescate Legal Servs., Inc. v. Executive Office of Immigration  
18 Review, 959 F.2d 742, 748 (9th Cir. 1992)). Union Plaintiffs have  
19 submitted evidence to this effect. Declaration of David Werlin,  
20 Docket No. 488, at ¶¶ 1-7; Second Voice Dec. at ¶¶ 1-19.<sup>4</sup>  
21  
22  
23

24 <sup>4</sup> Defendants' objections to this evidence are overruled.  
25 Plaintiffs' reply evidence was submitted in direct response to the  
26 standing issues Defendants raised in their opposition, and the  
27 Court has considered and overruled the objections based on  
28 evidentiary rules barring irrelevant testimony, hearsay testimony,  
testimony lacking personal knowledge, and improper expert and  
layperson testimony.

1 Defendants also argue that Union Plaintiffs lack prudential  
2 standing because their claims are not within the "zone of  
3 interests" protected by any of the laws on which Plaintiffs base  
4 their claims. This argument also fails. The zone of interests  
5 test "is not meant to be especially demanding; in particular,  
6 there need be no indication of congressional purpose to benefit  
7 the would-be plaintiff." Clarke v. Securities Indus. Ass'n, 479  
8 U.S. 388, 399-400 (1987). "The proper inquiry is simply 'whether  
9 the interest sought to be protected by the complainant is arguably  
10 within the zone of interests to be protected . . . by the  
11 statute.' . . . [W]e first discern the interests 'arguably . . .  
12 to be protected' by the statutory provision at issue; we then  
13 inquire whether the plaintiff's interests affected" by the action  
14 in question are among them. National Credit Union Admin. v. First  
15 Nat'l Bank & Trust Co., 522 U.S. 479, 492 (1998) (emphasis in  
16 original) (citation omitted). "Prudential standing is satisfied  
17 unless [the party's] interests are so marginally related to or  
18 inconsistent with the purposes implicit in the statute that it  
19 cannot reasonably be assumed that [the legislature] intended to  
20 permit the suit." Stormans, Inc. v. Selecky, 586 F.3d 1109, 1122  
21 (9th Cir. 2009) (quotation marks and citations omitted; brackets  
22 in original).

23  
24  
25  
26 Here, IHSS providers are within the zone of interests of the  
27 Medicaid Act, the ADA and the Rehabilitation Act because the  
28 services they provide are a critical component of the mandates and

1 benefits established by those laws. Although Plaintiffs have not  
2 cited cases holding that IHSS providers are within the zone of  
3 interests of these statutes, several courts have come to a similar  
4 conclusion in the context of persons who provide care subsidized  
5 by the Social Security Act. See California Ass'n of Bioanalysts  
6 v. Rank, 577 F. Supp. 1342, 1347 n.6 (C.D. Cal. 1983) ("While  
7 Medicaid providers are clearly not the primary beneficiaries of  
8 the Social Security Act . . . the majority view [is] that such  
9 providers are arguably within the zone of interests protected  
10 under the statute."); see also Edgewater Nursing Ctr., Inc. v.  
11 Miller, 678 F.2d 716, 718 (7th Cir. 1982) (plaintiff providers  
12 "have standing to challenge any feature of the state's plan that  
13 violates the [Medicaid] statute to their detriment"); Minnesota  
14 Ass'n of Health Care Facilities, Inc. v. Minnesota Dep't of Pub.  
15 Welfare, 602 F.2d 150, 153 n.6 (8th Cir. 1979) ("Appellants, as  
16 Medicaid providers, do have standing to challenge alleged  
17 violations of the Social Security Laws."). Thus, under the  
18 "arguably protected" standard, Union Plaintiffs are within the  
19 zone of interests of the statutes at issue.

20  
21  
22 In sum, although Union Plaintiffs need not establish standing  
23 in their own right because the individual Plaintiffs have  
24 standing, the Court concludes that Union Plaintiffs have satisfied  
25 the standing requirements.  
26  
27  
28

## 1 B. Medicaid Act Claims

2 Defendants argue that the Court should defer ruling on the  
3 merits of Plaintiffs' reasonable standards and sufficiency claims  
4 under the Medicaid Act, pending the Supreme Court's resolution of  
5 an appeal certified to address whether Medicaid recipients and  
6 providers may maintain a cause of action under the Supremacy  
7 Clause to enforce provisions of the statute. In the order  
8 explaining the injunction against the implementation of ABX4 4,  
9 the Court relied on Ninth Circuit precedent, specifically Shewry,  
10 543 F.3d at 1056-57, to find that Plaintiffs stated a claim under  
11 the Supremacy Clause, even though the Medicaid Act provision  
12 requiring reasonable standards is not privately enforceable under  
13 42 U.S.C. § 1983. October 23, 2009 Order at 18-19. Defendants  
14 appealed the Court's preliminary injunction. On January 28, 2011,  
15 the Ninth Circuit withdrew submission of the case and deferred  
16 ruling on the appeal, pending the Supreme Court's decision in the  
17 consolidated appeals of Maxwell-Jolly v. Indep. Living Ctr., 572  
18 F.3d 644 (9th Cir. 2009);<sup>5</sup> Maxwell-Jolly v. Calif. Pharmacists  
19 Ass'n, 374 Fed. Appx. 690 (9th Cir. 2010); and Maxwell-Jolly v.  
20 Santa Rosa Mem. Hosp., 380 Fed. Appx. 656 (9th Cir. 2010). On  
21 February 23, 2012, the Supreme Court remanded the consolidated  
22 appeal to the Ninth Circuit due a change in the procedural posture  
23  
24  
25

26 <sup>5</sup> Maxwell-Jolly v. Indep. Living Ctr., 572 F.3d 644 (9th Cir.  
27 2009), is a later appeal arising from the same case that produced  
28 the decision in Independent Living Ctr. v. Shewry, 543 F.3d 1050,  
1065 (9th Cir. 2008).

1 of the cases and did not resolve the certified question.<sup>6</sup> Douglas  
2 v. Independent Living Center of Southern California, Inc., Nos.  
3 09-958, 09-1158, and 10-283, slip. op. at 5-8 (U.S.). The Court  
4 declines to defer a decision on Plaintiffs' request for a  
5 preliminary injunction, pending the Ninth Circuit's resolution of  
6 the appeal on remand.

#### 7 1. Reasonable Standards Requirement

8  
9 The Medicaid Act requires that all participating states use  
10 "reasonable standards . . . for determining eligibility for and  
11 the extent of medical assistance under the plan which . . . are  
12 consistent with the objectives" of the program. 42 U.S.C.  
13 § 1396a(a)(17). The primary objectives of the Medicaid program  
14 are to provide medical assistance to individuals whose income and  
15 resources are insufficient to meet the costs of necessary medical  
16 services and to furnish "rehabilitation and other services to help  
17 such . . . individuals attain and retain capability for  
18 independence or self care." 42 U.S.C. § 1396-1.  
19

20  
21 <sup>6</sup> The Supreme Court explained that to qualify for federal  
22 Medicaid funds, states must submit a state Medicaid plan that  
23 details the nature and scope of services in their state's Medicaid  
24 program for review and approval by the federal agency, Centers for  
25 Medicare & Medicaid Services (CMS). In addition, states must  
26 submit, from time to time, any amendments to the plan for  
27 approval. In October 2011, after the Supreme Court heard oral  
28 argument in Independent Living Center, CMS approved several of  
California's statutory amendments to the plan. The Supreme Court  
found that the procedural posture of the case had changed, such  
that respondent Medicaid providers and beneficiaries may be  
required to proceed under the Administrative Procedure Act, 5  
U.S.C. § 701, et seq. On that basis, the Court remanded the  
appeal to the Ninth Circuit for further consideration.

1 Plaintiffs have demonstrated that they are likely to succeed  
2 on their claim that SB 73 violates the reasonable standards  
3 mandate of the Medicaid Act. The reduction in IHSS hours stems  
4 from California's budget crisis as opposed to evidence that the  
5 need for IHSS hours has been incorrectly evaluated. It is true  
6 that California is experiencing a budget crisis. Although  
7 budgetary needs may be considered in determining that service cuts  
8 are required, it may not be the sole reason for the reduction.  
9  
10 See Independent Living Center, 572 F.3d at 656 ("the State's  
11 decision to reduce Medi-Cal reimbursement rates based solely on  
12 state budgetary concerns violated federal law."); Beno v. Shalala,  
13 30 F.3d 1057, 1069 n.30 (9th Cir. 1994). Defendants assert that  
14 the implementation of the cuts is reasonable in that specific  
15 groups of recipients are exempt because "they are categorically at  
16 serious risk of out-of-home placement as a result of the  
17 reduction." ACL at 4.

19 However, certain IHSS recipients will be cut back to twenty  
20 percent fewer hours for reasons unrelated to need. These IHSS  
21 recipients are not in an exempt or pre-approved group and will  
22 receive a notice of action, even though they are presumptively at  
23 serious risk of out-of-home placement. Only if these seriously  
24 at-risk recipients submit a Supplemental Care application will  
25 they be considered for a restoration of needed service hours. In  
26 this respect, eligibility for services is determined, not by a  
27 reasonable need-based standard, but by the ability of seriously  
28

1 at-risk recipients to request in a timely manner a restoration of  
2 their hours. The CDSS could readily identify many of these  
3 seriously at-risk recipients, just as they have done with the  
4 exempt and pre-approved groups, because the determination that  
5 they are seriously at risk is based on information contained in  
6 CMIPS. Thus, even if rote reliance on functional ranks were a  
7 reasonable basis to determine need, Defendants' implementation  
8 plan is likely to be found unreasonable. Defendants' plan would  
9 deliberately cut services for IHSS recipients who are already  
10 known to be presumptively eligible for a restoration of their lost  
11 hours, should they protest the twenty percent reduction by  
12 applying for Supplemental Care. Defendants seemingly expect the  
13 State will save funds by cutting the service hours of those who  
14 are unable to protest the hours reduction.  
15

## 16 2. Comparability Requirement

17 The "comparability" requirement of the Medicaid Act mandates  
18 comparable services for individuals with comparable needs; it is  
19 violated when some recipients are treated differently than others  
20 with the same level of need. 42 U.S.C. § 1396a(a)(10)(B); see  
21 also 42 C.F.R. § 440.240; Jenkins v. Washington State Dep't of  
22 Social & Health Servs., 160 Wash. 2d 287, 296-97 (2007); Sobky v.  
23 Smoley, 855 F. Supp. 1123, 1139 (E.D. Cal. 1994) (comparability  
24 requirement "creates an equality principle" for all medically  
25 needy individuals); Schott v. Olszewski, 401 F.3d 682, 688-89 (6th  
26 Cir. 2005); White v. Beal, 555 F.2d 1146, 1151-52 (3d Cir. 1977).  
27  
28

1 A state may "place appropriate limits on a service based on such  
2 criteria as medical necessity or on utilization control  
3 procedures." 42 C.F.R. § 440.230(c)(2). However, a state may not  
4 "arbitrarily deny or reduce the amount, duration, or scope of a  
5 required service . . . to an otherwise eligible recipient solely  
6 because of the diagnosis, type of illness, or condition." 42  
7 C.F.R. § 440.230(c)(1).

8  
9 Defendants argue that SB 73 does not violate the  
10 comparability requirement because the exempted and pre-approved  
11 groups that categorically escape the twenty percent reduction are  
12 identified using objective, needs-based criteria, and recipients  
13 who receive the notice of action are afforded an opportunity to  
14 seek individualized review. Plaintiffs counter that the  
15 comparability requirement is violated because the use of  
16 functional ranks to determine service hours will result in  
17 recipients with comparable needs receiving different levels of  
18 IHSS. As the Court explained in its October 23, 2009 order, the  
19 use of functional ranks to determine eligibility for services  
20 likely violates the comparability requirement because it does not  
21 reasonably measure the individual need of a disabled or elderly  
22 person for a particular service. October 23, 2009 Order at 12-13.  
23 The functional rank of two, which recognizes a need for verbal  
24 assistance, compared to the ranks of three, four and five,  
25 reflects the nature of the assistance needed, not the severity of  
26 the need. For example, a person with a cognitive disorder may  
27  
28

1 only require verbal reminders or encouragement to eat and or take  
2 her medications, but the absence of such assistance could have a  
3 dramatic, negative impact on the recipient's health and ability to  
4 live safely at home.

5 Furthermore, it is likely that some recipients who are  
6 seriously at-risk for out-of-home placement and receive notice of  
7 the reduction will not be able timely to complete a Supplemental  
8 Care application. Thus, the reductions will go into effect for  
9 them. Yet, recipients with comparable or lesser needs who are  
10 able to and do request Supplemental Care may preserve their hours  
11 of service. A violation of the comparability requirement is  
12 likely to result from the automatic imposition of the twenty  
13 percent reduction on those IHSS recipients who do not apply for  
14 Supplemental Care before the deadline.

15  
16 As noted above, while recipients in State Home and Community  
17 Based Services waiver programs are exempt from the cut, recipients  
18 who qualify for these programs but are on waiting lists are not  
19 exempt. Defendants argue that Congress has waived the  
20 comparability requirement with respect to these programs by  
21 allowing states to provide specific services to certain targeted  
22 populations. See 42 U.S.C. § 1396n(c). This does not permit the  
23 State to violate the comparability mandate by cutting the basic  
24 services for some recipients with the same diagnoses and needs.  
25 IHSS recipients on the waiting lists who are eligible for the  
26 waiver programs should be eligible for the exemption granted to  
27  
28

1 those in the programs. The failure to exempt such recipients  
2 likely violates the comparability mandate.

3 Under the plan to implement SB 73, the differences in IHSS  
4 hours authorized for those who are exempted or pre-approved,  
5 compared to those are presumptively eligible for a restoration of  
6 hours, but fail to apply for it, are due to the CDSS's decision  
7 not to identify seriously at-risk recipients prior to subjecting  
8 them to a twenty percent reduction and, instead, to require such  
9 individuals to submit a Supplemental Care application. Therefore,  
10 Plaintiffs are likely to succeed on their comparability claim.

### 12 3. Sufficiency Requirement

13 The regulations implementing the Medicaid Act contain a  
14 "sufficiency" requirement, which mandates, "Each service must be  
15 sufficient in amount, duration, and scope to reasonably achieve  
16 its purpose." 42 C.F.R. § 440.230(b). When a state commits to  
17 provide a Medicaid service, the sufficiency requirement ensures  
18 that it adequately fulfills its commitment.

19 Defendants first argue that federal regulation 42 C.F.R.  
20 § 440.230(b) cannot provide the basis for Plaintiffs' sufficiency  
21 claim. However, as the Court noted in its October 2009 order,  
22 federal regulations may carry preemptive force, see, e.g., Geier  
23 v. American Honda Motor Co., 529 U.S. 861, 884-86 (2000), and, as  
24 such, they may provide a cause of action for injunctive relief  
25 under the Supremacy Clause.  
26  
27  
28

1 The IHSS hours authorized for recipients are those that the  
2 State has determined to be necessary to permit the recipients to  
3 remain safely in their homes. MPP § 30-761.1. As a result, the  
4 twenty percent reduction in these services will likely leave  
5 affected individuals without a level of service sufficient to  
6 achieve the purpose of the program.

7  
8 The Supplemental Care application does not alter this likely  
9 outcome because the review process occurs only after recipients  
10 submit an application by the deadline. It is probable that some  
11 recipients will not be able to apply and that some who need  
12 restoration of IHSS hours will attempt to cope with the reduction,  
13 allowing the deadline to pass before realizing the full impact of  
14 the reduced hours.

15  
16 The State concedes that the test it will use to restore hours  
17 pursuant to the Supplemental Care application--hours necessary to  
18 avoid serious risk of out-of-home placement--is identical to the  
19 standard for the authorization of IHSS hours that was used in the  
20 first place--necessary for the IHSS recipient to remain safely at  
21 home. Nonetheless, the Supplemental Care worksheet demonstrates  
22 that IHSS recipients who do not meet the test in Parts A or B of  
23 the worksheet, because they have functional ranks that entail only  
24 verbal or some human assistance to complete certain functions,  
25 will not be eligible for a restoration of their reduced IHSS  
26 hours. Based on their functional ranks, IHSS recipients will be  
27 deprived of hours that the State has previously determined are  
28

1 necessary for them to remain safely at home. The worksheet  
2 requires a mechanistic calculation that leaves no opportunity to  
3 consider individual need that may exist in spite of a recipient's  
4 seemingly disqualifying functional ranks. The only individualized  
5 determination allowed is to cut the hours for which an IHSS  
6 recipient would otherwise be eligible, if he or she can manage  
7 some other way. The Supplemental Care application process  
8 exacerbates the fact that functional ranks are not an accurate  
9 measure of need in the first place, because functional ranks  
10 indicate the nature of the assistance, rather than the importance  
11 of the need for the assistance to ensure that the recipient is  
12 able to remain safely at home.

14 Plaintiffs have demonstrated a likelihood of succeeding on  
15 the merits of their claim that SB 73 imposes cuts that will  
16 deprive IHSS recipients of IHSS hours sufficient to ensure that  
17 they are able to remain safely at home.

19 C. ADA and Rehabilitation Act Claims

20 The ADA and the Rehabilitation Act prohibit discrimination  
21 based on disability. 42 U.S.C. § 12132; 29 U.S.C. § 794(a).  
22 Unnecessary isolation is a form of discrimination against people  
23 with disabilities. As the Supreme Court has explained,  
24 "unjustified isolation" of the disabled amounts to discrimination  
25 because institutional placement "perpetuates unwarranted  
26 assumptions that persons so isolated are incapable or unworthy of  
27 participating in community life" and "severely diminishes everyday  
28

1 life activities of individuals, including family relations, social  
2 contacts, work options, economic independence, educational  
3 advancement, and cultural enrichment." Olmstead v. L.C. ex rel.  
4 Zimring, 527 U.S. 581, 597, 600-01 (1999). Thus, both the ADA and  
5 the Rehabilitation Act contain an "integration mandate" which  
6 "serves one of the principal purposes of Title II of the ADA:  
7 ending the isolation and segregation of disabled persons." Arc of  
8 Washington State v. Braddock, 427 F.3d 615, 618 (9th Cir. 2005).  
9 States are required to provide care in integrated environments for  
10 as many disabled persons as is reasonably feasible, so long as  
11 such an environment is appropriate to their health needs.  
12 Specifically, the ADA regulations provide: "A public entity shall  
13 administer services, programs, and activities in the most  
14 integrated setting appropriate to the needs of qualified persons  
15 with disabilities." 28 C.F.R. § 35.130(d). "The 'most integrated  
16 setting' is defined as 'a setting that enables individuals with  
17 disabilities to interact with non-disabled persons to the fullest  
18 extent possible.'" Brantley, 2009 WL 2941519, at \*6 (citing 28  
19 C.F.R. pt. 35 app. A; Olmstead, 527 U.S. at 592). Plaintiffs who  
20 currently reside in community settings may assert ADA integration  
21 claims to challenge state actions that give rise to a risk of  
22 unnecessary institutionalization. See Fisher v. Oklahoma Health  
23 Care Auth., 335 F.3d 1175, 1181-82 (10th Cir. 2003).  
24  
25  
26

27 Defendants assert that Plaintiffs are unlikely to succeed  
28 because they do not have Article III standing to pursue their ADA

1 claim. Defendants assert that individual Plaintiffs have failed  
2 to demonstrate injury under Article III because they have not  
3 shown that they are at imminent risk of institutionalization. For  
4 the reasons explained above, Plaintiffs have Article III standing  
5 because they face a "credible threat" of harm in that they are  
6 likely to face a twenty percent reduction in their IHSS service  
7 hours. See Cent. Delta Water Agency, 306 F.3d at 946. Defendants  
8 confuse the constitutional standing requirement of injury in fact  
9 with the merits of Plaintiffs' claim that SB 73 unlawfully creates  
10 a risk of unnecessary institutionalization. The record  
11 demonstrates the likelihood that IHSS recipients who are  
12 presumptively eligible for a restoration of hours will not have  
13 their hours restored because they will be unable timely to submit  
14 a request for Supplemental Care. The evidence also shows that  
15 Plaintiffs are likely to succeed in demonstrating that the loss of  
16 IHSS hours will compromise the health and well-being of IHSS  
17 recipients such that they will be at serious risk of  
18 institutionalization.<sup>7</sup> M.R. v. Dreyfus, 663 F.3d 1100, 1116 (9th  
19 Cir. 2011) ("An ADA plaintiff need not show that  
20 institutionalization is 'inevitable' or that she has 'no choice'  
21  
22  
23

---

24  
25 <sup>7</sup> Defendants' objections to IHSS recipients' testimony about  
26 the health risks posed by the twenty percent reduction in IHSS  
27 hours are overruled. The declarants have personal knowledge of  
28 the likely impact that the lost hours will have on their health  
and their ability to remain safely at home based on their personal  
knowledge of their own health status and past experiences.

1 but to submit to institutional care in order to state a violation  
2 of the integration mandate.").

3 Defendants also argue that Plaintiffs' claim that the ADA and  
4 Rehabilitation Act require the continuation of IHSS hours for  
5 certain individuals amounts to impermissible commandeering under  
6 the Tenth Amendment. This argument is foreclosed by Lovell v.  
7 Chandler, 303 F.3d 1039 (9th Cir. 2002). There the Ninth Circuit  
8 rejected the argument that Congress exceeded its Spending Clause  
9 powers and the conditions set forth in South Dakota v. Dole, 483  
10 U.S. 203 (1987), when it approved section 504 of the  
11 Rehabilitation Act, 29 U.S.C. § 794(a). Id. at 1051. The court  
12 reasoned that Congress has a strong interest in ensuring that  
13 federal funds are not used in a discriminatory manner and in  
14 holding states responsible when they violate funding conditions.  
15 Id. The court also found an inadequate showing of "extraordinary  
16 circumstances . . . that would allow us to hold that Congress  
17 exceeded constitutional boundaries." Id. (internal citations  
18 omitted).

19  
20  
21 Finally, Defendants have not established that the integration  
22 mandate is limited to deterring the unjustified isolation of  
23 disabled individuals in twenty-four-hour residential nursing care  
24 centers.

25  
26 Plaintiffs have established their likelihood of success on  
27 the merits of their claims under the ADA and the Rehabilitation  
28 Act.

## 1 D. Due Process Claims

2 When parties are threatened with the loss of a protected  
3 property interest, due process under the Fourteenth Amendment  
4 requires that a state must provide "notice reasonably calculated,  
5 under all the circumstances, to apprise interested parties of the  
6 pendency of the action and afford them an opportunity to present  
7 their objections." See Mullane v. Central Hanover Bank & Trust  
8 Co., 339 U.S. 306, 314-15 (1950). IHSS recipients must receive  
9 "timely and adequate notice detailing the reasons" for the adverse  
10 action and "an effective opportunity to defend" themselves.  
11 Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970). To comport with  
12 due process, notice must be "tailored to the capacities and  
13 circumstances" of the recipients who must decide whether to  
14 request a hearing. Id. at 268. "The government must consider  
15 unique information about an intended recipient regardless of  
16 whether a statutory scheme is reasonably calculated to provide  
17 notice in the ordinary case." Jones v. Flowers, 547 U.S. 220, 221  
18 (2006).

19 Plaintiffs are likely to show that notice of the reductions  
20 is not reasonably calculated to inform IHSS recipients. The  
21 explanation letter is deficient in several respects. The letter  
22 does not use simple language. It uses small print, and a font and  
23 formatting that undermine the letter's readability. Declaration  
24  
25  
26  
27  
28

1 of Gavin Huntley-Fenner, Ph.D., at ¶¶ 14-17.<sup>8</sup> Relying on the  
2 results of various readability tests, among other things, Dr.  
3 Huntley-Fenner opined that the information contained in the letter  
4 was presented at a level of reading difficulty well above that of  
5 many adult beneficiaries of Medi-Cal, California's Medicaid  
6 program. The plan fails to provide for any method of notification  
7 other than written. Thus, Plaintiffs are likely to demonstrate  
8 that the explanation letter is not reasonably calculated to inform  
9 IHSS recipients who have visual and cognitive disabilities, or  
10 read at a lower level or not at all.

11  
12 Furthermore, the letter does not specifically address how to  
13 access translations of the notices and forms or even state that  
14 they are available. The IHSS recipient population includes people  
15 who cannot read English, Spanish, Armenian or Chinese. Therefore,  
16 the letter is not reasonably calculated to provide notice to the  
17 linguistically diverse population of IHSS recipients.

18  
19 The letter erroneously states that section 12301.07 of the  
20 California Welfare and Institutions Code requires a twenty percent  
21 reduction of each IHSS recipient's service hours, without noting

22 \_\_\_\_\_  
23 <sup>8</sup> The Court overrules Defendants' evidentiary objection to  
24 Dr. Huntley-Fenner's testimony that it amounts to improper expert  
25 opinion. Dr. Huntley-Fenner's declaration establishes his  
26 qualifications as expert witness. Furthermore, his consideration  
27 of facts that underlie his opinions as to the readability of  
28 Defendants' notices and his opinions themselves do not amount to  
statements on the ultimate legal issue of whether the notices were  
adequate under due process standards. Fed. R. Evid. 704 ("An  
opinion is not objectionable just because it embraces an ultimate  
issue.")

1 the exceptions, and could be read to suggest that the twenty  
2 percent reduction will end on June 30, 2012.

3 The letter does not state in a plain and forthright manner  
4 that Supplemental Care amounts to the restoration of lost hours.  
5 It does not explain in a simple manner each enclosed form, or  
6 include step-by-step instructions for completing and mailing the  
7 necessary forms. A recipient could fail to understand that the  
8 Supplemental Care application must be submitted immediately and  
9 that the form to request a hearing is submitted only if the former  
10 is denied and the recipient wishes to protest the denial. The  
11 letter further states that requests for a hearing only to dispute  
12 the new law requiring the twenty percent reduction will be dismissed,  
13 which could confuse or mislead a recipient to believe that the hearing  
14 is not an opportunity to appeal the twenty percent reduction of his or  
15 her own service hours that resulted from the law. Although the  
16 letter states that a recipient may contact his or her county IHSS  
17 office for further information, it does not identify the relevant  
18 contact person or phone number to call.  
19  
20

21 Finally, the Supplemental Care application is inadequate.  
22 The application requires recipients to explain why they require  
23 the restoration of their hours but does not mention functional  
24 ranks. This suggests that the CDSS will consider the written  
25 explanation as the basis for the decision to restore hours. IHSS  
26 recipients are not informed of the role of functional ranks in the  
27 determination of whether IHSS hours will be restored or of their  
28

1 own disqualifying functional ranks. These omissions and  
2 misleading statements leave IHSS recipients uninformed of the  
3 actual reason for the decision to reduce their hours and unable to  
4 rebut it effectively.

5 Defendants assert that Jones, 547 U.S. at 200, and Covey v.  
6 Town of Somers, 351 U.S. 141 (1956), are inapposite because they  
7 address the manner of notice, rather than content. This  
8 distinction is immaterial. Jones involved the sale of property by  
9 the state due to the owner's tax delinquency and the adequacy of  
10 notice to the owner. The state had mailed a certified letter in  
11 an attempt to notify the owner of the tax delinquency, but the  
12 notice was returned as unclaimed. Citing Mullane, the Court  
13 reasoned that the means employed to give notice "must be such as  
14 one desirous of actually informing" the individual entitled to  
15 notice. The content of the State's notice, as well as the manner  
16 of its delivery, may evidence the State's desire actually to  
17 inform the IHSS recipients of the way to escape the twenty percent  
18 reduction.  
19  
20

21 Plaintiffs have demonstrated that they are likely to succeed  
22 on their due process claims.

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

24 As the Court noted in its first preliminary injunction order,  
25 numerous federal courts have recognized that the reduction or  
26 elimination of public medical benefits irreparably harms the  
27  
28

1 participants in the programs cut. October 23, 2009 Order at 26.

2 See also, M.R., 663 F.3d at 1108-1115.

3 The substantial evidence submitted by Plaintiffs, as  
4 exemplified by Mr. Thurman's and Ms. Stern's declarations,  
5 demonstrates the likelihood of irreparable harm resulting from the  
6 reduction in IHSS hours. Plaintiffs like these have shown that  
7 the reduction in services, including domestic services, places  
8 their health in jeopardy, such that they are more likely to fall  
9 and injure themselves, eat less healthily or live in unhygienic  
10 conditions. These unhealthy conditions increase the risk that  
11 they will be unable to live safely at home and instead will be  
12 institutionalized.

13  
14 Because Defendants' interests are strictly fiscal and  
15 Plaintiffs' interests affect their health, well-being and ability  
16 to remain safely at home, the equities clearly weigh in favor of  
17 Plaintiffs. M.R., 663 F.3d at 1120 (stating that the Ninth  
18 Circuit has "several times held that the balance of hardships  
19 favors beneficiaries of public assistance who may be forced to do  
20 without needed medical services over a state concerned with  
21 conserving scarce resources.").

22  
23 In fact, the deprivation of essential services to the  
24 disabled is part of the assessment of the public interest at  
25 stake. Lopez v. Heckler, 713 F.2d 1432, 1437 (9th Cir. 1983).  
26 Further, Plaintiffs have demonstrated that IHSS is likely to be  
27 cost-effective as compared to the expenses incurred when disabled  
28

1 and elderly individuals are institutionalized. See e.g. Kline  
2 Decl., Docket No. 31, Ex. G at 7, Table 2; Second Declaration of  
3 Dionne Jimenez, Docket No. 373, at ¶¶ 3-7. This evidence further  
4 supports that the balance of equities and public interest weighs  
5 in favor of Plaintiffs. M.R., 663 F.3d at 1120 ("Plaintiffs have  
6 advanced such evidence . . . showing that if program beneficiaries  
7 currently treated in their homes transition to more costly  
8 institutional care, the state will not realize its anticipated  
9 savings.").

11 In addition to establishing a likelihood of success on the  
12 merits, Plaintiffs have demonstrated their likelihood of  
13 irreparable harm, that the balance of equities weighs in their  
14 favor, and that an injunction serves the public interest.

#### 15 CONCLUSION

16 Because Plaintiffs have demonstrated a likelihood of success  
17 on the merits and irreparable harm, such that the equities weigh  
18 in their favor, their request for a preliminary injunction is  
19 granted. The injunction will issue in a separate order. The  
20 Court recognizes California's continuing budget crisis, and will  
21 not foreclose all reductions of IHSS hours. The State may cut  
22 IHSS hours if unnecessary hours are being compensated, but may not  
23 impose cuts mechanistically and then determine the actual needs  
24 thereafter. And, the State must give adequate notice to IHSS  
25 recipients of the reasons for the reduction of their authorized  
26 service hours, and of their remedies.  
27  
28

1 At the hearing on the motion for a preliminary injunction,  
2 the Court asked the parties to meet and confer and attempt to  
3 agree on proposed terms for an injunction that would remedy the  
4 defects the Court found, in the most effective and least intrusive  
5 way. The parties have not reached agreement. Nonetheless, the  
6 Court would entertain such proposals to modify the injunction.

7  
8 The Court exercises its discretion to waive the bond  
9 requirement for Plaintiffs because they are indigent and to ensure  
10 their ability to access the courts on behalf of themselves and  
11 other class members. See Save Our Sonoran, Inc. v. Flowers, 408  
12 F.3d 1113, 1126 (9th Cir. 2005); Walker v. Pierce, 665 F. Supp.  
13 831, 844 (N.D. Cal. 1987).

14 IT IS SO ORDERED.

15  
16  
17 Dated: 3/2/2012

  
\_\_\_\_\_  
CLAUDIA WILKEN  
United States District Judge

United States District Court  
For the Northern District of California

United States District Court  
For the Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

DAVID OSTER, et al.,  
Plaintiffs,  
v.

No. C 09-4668 CW  
PRELIMINARY  
INJUNCTION

WILL LIGHTBOURNE, Director of the  
California Department of Social  
Services; TOBY DOUGLAS, Director  
of the California Department of  
Health Care Services; CALIFORNIA  
DEPARTMENT OF HEALTH CARE  
SERVICES; and CALIFORNIA  
DEPARTMENT OF SOCIAL SERVICES,  
Defendants.

\_\_\_\_\_ /

IT IS HEREBY ORDERED that, except in accordance with the  
order below, Defendants and their successors, agents, officers,  
servants, employees, attorneys and representatives and all persons  
acting in concert or participating with them are enjoined from  
implementing the provisions of SB 73 that enacted section 12301.07  
of the California Welfare and Institutions Code, which imposes a  
twenty percent reduction in authorized hours of In-Home Support  
Services for IHSS recipients not exempt or pre-approved for  
exceptions to the reductions, and establishes a Supplemental Care  
application process available to IHSS recipients to seek the  
restoration of reduced hours.

1 Defendants may reduce IHSS recipients' service hours by  
2 twenty percent, or any other number, only after conducting a needs  
3 reassessment to determine the number of IHSS service hours that  
4 are necessary to enable the recipient to remain safely at home. A  
5 reduction of IHSS hours shall not be based on functional ranks  
6 alone, or on Functional Index Scores. The State shall bear the  
7 cost of counties' reassessment efforts to the extent those  
8 activities go beyond existing legal requirements for  
9 reassessments.  
10

11 IHSS recipients who qualify, and are on waiting lists, for  
12 State Home and Community Based Services Waiver programs shall be  
13 exempt from the reductions, like those recipients who are  
14 currently enrolled in the programs.  
15

16 Based on the CDSS's representation that all IHSS recipients  
17 who receive Early Periodic Screening Diagnosis and Treatment  
18 (EPSDT) services will be pre-approved for an exception to the  
19 reduction in services, the reduction shall not be applied to these  
20 recipients.  
21

22 Twenty-one days prior to instructing the counties to conduct  
23 any reassessments, or making changes to the Case Management,  
24 Information and Payrolling System (CMIPS) to implement such  
25 reassessments, Defendants shall serve and file a copy of their  
26 plan for conducting reassessments. The plan shall include the  
27 notice or notices Defendants intend to send to IHSS recipients.  
28

1 All notices to IHSS recipients regarding SB 73, including any  
2 notice of the right to request a state hearing, shall be written  
3 in a manner comprehensible to an individual who reads at a fifth  
4 grade level. Defendants shall verify that the notices are  
5 comprehensible to fifth grade level readers by considering  
6 guidance from official resources, such as those cited by  
7 Plaintiffs' expert, regarding readability and by consulting with a  
8 qualified expert to review the notices.  
9

10 Notice to IHSS recipients shall not include misleading or  
11 confusing statements, such as those addressed in this Court's  
12 order granting the preliminary injunction.

13 If an IHSS recipient's service hours are to be reduced,  
14 notice to the recipient shall explain the grounds for the hours  
15 reduction. If functional ranks were used, the notice must  
16 identify the recipient's functional ranks and describe how the  
17 ranks affected the reduction of hours.  
18

19 Defendants shall provide the notices in English, Spanish,  
20 Chinese, Hmong, Armenian, Russian and Vietnamese, and shall send  
21 each notice in the language appropriate to the IHSS recipient.  
22 Defendants shall identify a telephone number through which an IHSS  
23 recipient who is not literate in one of the above languages, or  
24 who has cognitive or visual impairments, can seek a reading and/or  
25 translation of the content of the notice. The notices shall  
26 inform IHSS recipients that they may call that number for that  
27 purpose.  
28

United States District Court  
For the Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

To ensure that all relevant parties are aware of the Court's injunction, Defendants shall, to the extent that they have not already done so in accordance with the December 1, 2011 Temporary Restraining Order, rescind any directions or notices issued to any person or entity for the reduction of IHSS benefits in accordance with SB 73, and shall notify all persons and entities that have received such directions or notices that IHSS benefits will not be reduced in the manner provided for in SB 73 and the ACL.

Defendants must mail this notice within four days of the date of this order.

Defendants shall post a copy of this preliminary injunction, with an explanation of its effects on IHSS services, conspicuously on the California Department of Social Services website within four days of the date of this order.

IT IS SO ORDERED.

Dated: 3/2/2012

  
\_\_\_\_\_  
CLAUDIA WILKEN  
United States District Judge