UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, ET AL.

Plaintiffs,

vs.

SANDRA SHEWRY, ET AL.

Defendants

Case No. CV 08-3315 CAS (MANx)

ORDER GRANTING PETITIONERS' THIRD MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION AND BACKGROUND

The facts and procedural history of this action are known to the parties and summarized in the Court's August 18, 2008 order granting in part and denying in part petitioners' motion for preliminary injunction. The August 18, 2008 order is currently under appeal in the Ninth Circuit.

On October 24, 2008, the California Association of Health Services at Home ("CAHSAH") filed a related action: California Association of Health Services at Home v. Sandra Shewry, Case No. CV 08-7045 CAS (MANx). Also on October 24, 2008, the California Medical Transportation Association ("CMTA") filed a related action:

California Medical Transportation Association v. Sandra Shewry, CV 08-7046 (MANx).

On October 29, 2008, respondent filed a motion to stay proceedings or in the alternative for continuance of hearing on the instant third motion for preliminary injunction. Petitioners and intervenors filed oppositions on October 30, 2008. On November 3, 2008, the Court issued an order staying all three proceedings until further order by the Court, but declining to the continue the hearing for the instant motion.

The instant third motion for preliminary injunction was filed by petitioners on October 27, 2008. The motion seeks to enjoin the 10 percent Medi-Cal reimbursement rate reduction mandated by Assembly Bill X3 5 ("AB 5") as to providers of non-emergency medical transportation ("NEMT") services and providers of home health services. Respondent filed an opposition on November 3, 2008. On November 3, 2008, respondent also filed objections to portions of petitioners' submitted declarations.[1] A reply was filed on November 10, 2008. On November 11, 2008, petitioners filed two

[1] Respondent objects to the admissibility of certain portions of the declarations submitted by petitioners. However, this Court may consider inadmissible evidence on a motion for preliminary injunction, giving such evidence appropriate weight depending on the competence, personal knowledge, and credibility of the declarants. 11A Charles A. Wright, Arthur K. Miller, & Mary K. Kane, Federal Practice and Procedure § 2949 at 216-17 (2d ed. 1995); see also Ross-Whitney Corp. v. SmithKline & French Laboratories, 207 F.2d 190, 198 (9th Cir. 1953) (stating that preliminary injunction may be granted on affidavits); Flynt Distrib. Co. v. Harvey, 734 F.2d 1389, 1394 (9th Cir. 1984) ("The urgency of obtaining a preliminary injunction necessitates a prompt determination and makes it difficult to obtain affidavits from persons who would be competent to testify at trial. The trial court may give even inadmissible evidence some weight, when to do so serves the purpose of preventing irreparable harm."); Republic of Philippines v. Marcos, 862 F.2d 1355, 1363-64 (9th Cir. 1988); Seuss Ents. v. Penguin Books USA, Inc., 924 F. Supp. 1559, 1562 (S.D. Cal. 1996) ("Such evidence may yet be considered by the court, which has discretion to weigh the evidence as required to reflect its reliability.").

requests for judicial notice.[2] A hearing was held on November 17, 2008. After carefully considering the arguments set forth by the parties, the Court finds and concludes as follows.

II. LEGAL STANDARD

A preliminary injunction is appropriate when the moving party shows either (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) the existence of serious questions going to the merits and that the balance of hardships tips sharply in the moving party's favor. See Rodeo Collection, Ltd. v. West Seventh, 812 F.2d 1215, 1217 (9th Cir. 1987). These are not two distinct tests, but rather "the opposite ends of a single 'continuum in which the required showing of harm varies inversely with the required showing of meritoriousness.'" Id. A "serious question" is one on which the movant "has a fair chance of success on the merits." Sierra On-Line, Inc. v. Phoenix Software, Inc., 739 F.2d 1415, 1421 (9th Cir. 1984).

III. DISCUSSION

Petitioners state that when they briefed the Court earlier this year regarding their motion for preliminary injunction of AB 5's ten percent Medi-Cal reimbursement rate reduction, they did not yet have evidence regarding the effect of the ten percent rate reduction on NEMT providers and home health services providers. Mot. at 1. Petitioners argue that they have now obtained such evidence, and therefore move the

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[2]Petitioners request that the Court take judicial notice of the following documents: Cal. Welf. & Inst. Code §§ 14105, 14132(i)-(j); 42 U.S.C. §§ 1396(a)(28), 1396d(a)(7); 42 C.F.R. §§ 440.70, 440.130, 440.170, 440.180, 440.181, 440.185, 441.15; State Medicaid Plan, Attachment 3.1-B; 22 Cal. Code of Regulations §§ 51151, 51523; Bill Documents of Assembly Bill 3X 5; "HCBS Waivers - Section 1915(c) (from the Department of Health Care Services website); and this Court's August 18, 2008 Order Granting in Part and Denying in Part Petitioners' Motion for Preliminary Injunction, pp 1-11. Under Fed. R. Evid. 201, a court may take judicial notice of "matters of public record." Mack v. South Bay Beer Distrib., 798 F.2d 1279, 1282 (9th Cir.1986). As such, judicial notice is proper. However, the Court need not take judicial notice of the Court's August 18, 2008 order, as it is part of the record in the instant action.

Court to preliminarily enjoin the ten percent rate reduction as to these two provider groups. Mot. at 1.

A. STANDING

Before proceeding to the merits of petitioners' argument, the Court must first address the issue of standing raised by the parties. Petitioners argue that the services at issue – NEMT and home health services – are used by clients and members of plaintiffs Independent Living Center and the Gray Panthers, and that the ten percent Medi-Cal reimbursement rate reduction threatens these clients and members with "at the very least, . . . loss or difficulty in obtaining their home health care and their life-needed transportation to their treating physicians or clinics." Mot. at 2. Petitioners also argue that three named plaintiffs – Mark Beckwith, Margaret Dowling, and Jason Young – are threatened with irreparable injury from the ten percent rate reduction to NEMT and home health services. Reply at 3. Petitioners argue that, therefore, they may sue in a *jus tertii* capacity to advance the interests of their patients and clients where such patients and clients are unable to advance their own interests. Mot. at 5.

Respondent, however, argues that petitioners do not have standing. Specifically, respondent argues that petitioners may not sue on behalf of CMTA and CAHSAH, because petitioners do not have a special relationship with NEMT providers or home health services providers, and because there is no evidence that CMTA and CAHSAH cannot represent their own interests. Opp'n at 7.

Respondent's argument, however, does not demonstrate that petitioners lack standing. Petitioners do not claim standing to sue on behalf of CMTA and CAHSAH, but rather on behalf of their clients and members whose interests may be affected by the ten percent Medi-Cal reimbursement rate reduction to NEMT and home health services. In its September 17, 2008 Order, the Ninth Circuit held that petitioners have standing to challenge AB 5. The Court noted that, in addition to representing independent pharmacies and health care providers participating in the Medi-Cal program,

> petitioners also include several individual Medi-Cal beneficiaries,

> who will be injured or put at risk of injury by implementation of the 10% provider payments cuts because those cuts will reduce quality services, and access to quality services. This injury, like the injury to medical providers discussed above, is the direct result of the Director's implementation of AB 5, and would certainly be remedied by a decision granting injunctive relief. Such an injury to those individuals most directly affected by the administration of [a state welfare] program is sufficient to allow petitioners to seek injunctive relief in federal court.

Indep. Living Ctr. of S. Cal. v. Shewry, 2008 U.S. App. LEXIS 19725 (9th Cir. 2008). Because petitioners represent Medi-Cal beneficiaries who may be harmed by the ten percent rate reduction, the Court holds that petitioners have standing.

B. JURISDICTION

Respondent also argues that this Court is divested of jurisdiction to decide petitioners' motion, because the motion involves an issue that is currently on appeal in the Ninth Circuit: whether Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 et seq. ("the Medicaid Act") preempts AB 5. Opp'n at 5. However, the Court notes that the specific issue on appeal before the Ninth Circuit is whether the Court properly enjoined the ten percent rate reduction as to "physicians, dentists, pharmacies, adult day health care centers, [and] clinics." See August 18, 2008 Order. Here, by contrast, the issue to be decided is whether the ten percent rate reduction should be enjoined as to NEMT and home health services providers. Therefore, because a different issue is before the Court than that which is currently on appeal, the Court finds that it is not divested of jurisdiction to consider petitioners' motion.

C. LIKELIHOOD OF SUCCESS ON THE MERITS

Pursuant to the Ninth Circuit's mandate, petitioners may pursue a claim for relief under the Supremacy Clause based on the allegation that AB 5 is preempted by § 30(A)

of the Medicaid Act (referred to herein as "§ 30(A)"). Here, petitioners' Supremacy Clause claim is predicated upon federal conflict preemption. Under general principles of federal preemption, state law is preempted only to the extent that it actually conflicts with federal law. Pacific Gas & Elec. Co. v. State Energy Comm'n, 461 U.S. 190, 204 (1983). Such a conflict may arise either where "compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id. at 203-04 (citations omitted).

Thus, to prevail on the merits petitioners will have to prove either that it is not possible for the Department to comply with both AB 5 and the Medicaid Act or that AB 5 stands as an obstacle to the enforcement of § 30(A). As such, the Court turns to the statutory provisions at issue here.

The "quality of care" provision of § (30)(A) provides that

> [a] State plan for medical assistance must . . . provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care.

42 U.S.C. § 1396a(30)(A). The "equal access" provision of § 30(A) provides that

> [a] State plan for medical assistance must . . . provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are . . . sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.

Id.

In Orthopaedic Hospital v. Kizer, 1992 WL 345652 (C.D. Cal. 1992)

("Orthopaedic I"), plaintiff-hospital providers filed suit pursuant to 42 U.S.C. § 1983 ("§ 1983"), claiming that the Director violated § 30(A) by setting reimbursement rates for hospital outpatient services without considering the effect of hospital costs on efficiency, economy, and quality of care.[3] Id. at *1. The district court concluded that § 30(A) was enforceable in a § 1983 action, and that the Department "had a judicially enforceable obligation" to consider and make findings each time it modified reimbursement rates. Id. at *2. According to the district court, § 30(A) obligated the Department to consider efficiency, economy, and quality of care, which it referred to as the "relevant factors." Id. at *4. The district court found that the Director had acted arbitrarily and capriciously in establishing six of the seven challenged rates. Id. The court then remanded the matter to the Department for further consideration. Id. at *14. Upon remand, the Department conducted a rate study, and readopted the reimbursement rates without change. Orthopaedic Hospital II/III, 103 F.3d at 1495.

The hospitals returned to the district court, filing two lawsuits (Orthopaedic II/III) that the district court consolidated, arguing that the adopted rates did not comply with § 30(A). Id. The district court entered judgment in favor of the Department, finding that the Department was not statutorily required to consider hospital costs when setting reimbursement rates. Id. The hospitals appealed, and the Ninth Circuit reversed. The Ninth Circuit's interpretation held that § 30(A) "provides that payments for services must be consistent with efficiency, economy, and quality of care, and that those *payments* must be sufficient to enlist enough providers to provide access to Medicaid recipients." Id. at 1496 (emphasis in original). The Ninth Circuit therefore concluded that under § 30(A)

> the Director must set hospital outpatient reimbursement rates that bear a reasonable relationship to efficient and economical hospitals' costs of

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[3] The hospitals did not, however, cha llenge the rates under the "equal access" provision. Orthopaedic I, 1992 WL 345652 at *14 n.4.

> providing quality services, unless the Department shows some justification for rates that substantially deviate from such costs. To do this, the Department must rely on responsible cost studies, its own or others', that provide reliable data as a basis for its rate setting.

Id.[4] Further, the Ninth Circuit found that "[i]t is not justifiable for the Department to reimburse providers substantially less than their costs for purely budgetary reasons." Id. at 1499 n.3.[5]

Whatever else its effect may have been, it is clear that Sanchez v. Johnson, 416 F.3d 1051 (9th Cir. 2005) left undisturbed the rule announced in Orthopaedic Hospital that § 30(A) creates duties on behalf of the Department, i.e., the duty to consider efficiency, economy, and quality of care when establishing reimbursement rates. Indeed, the Sanchez court recognized that "[§ 30(A)] speaks . . . of the *State's obligation* to develop 'methods and procedures' for providing services generally." Sanchez, 416 F.3d at 1059 (emphasis added).

Because Orthopaedic Hospital is binding authority on this Court, the Court finds that when the State of California seeks to modify reimbursement rates for health care services provided under the Medi-Cal program, it must consider efficiency, economy,

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[4] See e.g., Alaska Dep't of Health & Soc. Servs. v. Ctrs. for Medicare & Medicaid Servs., 424 F.3d 931, 940-41 (9th Cir. 2005); see also Arkansas Med. Soc'y v. Reynolds, 6 F.3d 519, 530 (8th Cir. 1993) ("We agree with the trial court's conclusion that the relevant factors that DHS is obliged to consider in its rate-making decisions are the factors outlined in 42 U.S.C. § 1396a(a)(30)(A)."); cf. Methodist Hosps. v. Sullivan, 91 F.3d 1026, 1030 (7th Cir. 1996) (finding that § 30(A) does not require a state to consider any particular factors, but rather, requires that the state arrive at substantive results consistent with the Medicaid Act); Rite Aid, Inc. v. Houstoun, 171 F.3d 842 (3d Cir. 1999) (same).

[5] Subsequently, in Sanchez v. Johnson, 416 F.3d 1051 (9th Cir. 2005), the Ninth Circuit held that § 30(A) does not confer individual rights that are enforceable under 42 U.S.C. § 1983. Id. at 1060. However, in light of the mandate of the Ninth Circuit, the Court assumes that petitioners herein have standing because they bring suit to enjoin enforcement of a state law that is claimed to be preempted by federal law.

and quality of care, as well as the effect of providers' costs on those relevant statutory factors.

The Court now turns to AB 5. Section 14 of AB 5 adds Cal. Welf. & Inst. Code § 14105.19, which directs the Director to reduce by ten percent payments under the Medi-Cal fee-for-service program for physicians, dentists, pharmacies, adult day health care centers, clinics, health systems, and other providers for services provided on or after July 1, 2008, and which directs the Director to reduce by "actuarial equivalent" the ten percent rate reduction to managed health care plans that contract with the Department on or after July 1, 2008. Cal. Welf. & Inst. Code § 14105.19(b)(1), (3). Section 15 of AB 5 adds Cal. Welf. & Inst. Code § 14166.245, which reduces payments to acute care hospitals not under contract with the Department for inpatient services provided on or after July 1, 2008. Cal. Welf. & Inst. Code § 14166.245(c).

In the Court's August 18, 2008 order, the Court noted that respondent had not proffered any evidence showing that the Department considered any of the "relevant factors," in making the ten percent rate reduction challenged here.[6] The Court further noted that AB 5 itself suggests that the only reason for imposing the cuts was

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[6] In her supplemental opposition submitted in the August 18, 2008 injunction proceeding, respondent argued that

> Petitioners' proffered documents show that the Legislature did consider [the relevant] factors. The LegislativeAnalyst's Office (LAO) Report shows that the Legislature was presented with andconsidered the possible effects of AB 5 on Medi-Cal program participants.

Respondent's Supplemental Opp'n at 13 (citing Petitioners' Decl. No. 63, Declaration of Jan S. Raymond, Ex. B (Legislative Analyst's report) at 37). However, the Court noted that all the Legislative Analyst's report showed was that such a report was prepared. The Court determined that respondent had not shown that the Legislature ever reviewed or considered the concerns raised therein. Further, the Court noted that respondent had repeatedly argued that the State does not have any obligation to consider any of the statutory factors addressed herein, and that the Department does not conduct any studies in this regard.

California's current fiscal emergency. See AB 5, §§ 16-17 ("This act addresses the fiscal emergency declared by the Governor . . . . This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution."). The Court also stated that, at the hearing, respondent argued that neither the Legislature, nor the Department had a duty to consider any particular factors or to conduct any particular studies. Therefore, the Court determined that respondent had not made the required inquiries in deciding to enact the ten percent rate reduction.

In its opposition to the instant motion, respondent provides the declaration of Timothy Matsumoto ("Matsumoto"), the Department's Chief of the Provider Rate Section, Rate Development Branch, which, respondent argues, demonstrates that the Department did, in fact, make the required inquiry in deciding to enact the ten percent rate reduction. Opp'n at 15. The Matsumoto declaration states that at the time the ten percent reduction was implemented, the Department was "not aware" of any problems with Medi-Cal recipients having access to NEMT and home health services. Matsumoto Decl. ¶¶ 5, 6. Furthermore, the declaration states that the Department has compared the number of paid claims for NEMT and home health services in July 2008 to the number in July 2007, and has found that the number of paid claims are roughly comparable.[7] However, respondent fails to show how the Department's "lack of awareness" and its one after-the-fact comparison of the number of paid claims are sufficient to establish that the Department considered the "relevant factors" of efficiency, economy, and quality of care in establishing reimbursement rates, as required

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[7] Matsumoto states that the number of paid claims for home health services in July 2008 was 92 percent of the number for July 2007. Matsumoto Dec. ¶ 5. Matusumoto also states that the number of paid claims for NEMT services in July 2008 was 98 percent of the number for July 2007. Matsumoto Dec. ¶ 6. Matsumoto states that he believes that the remaining discrepancies between the number of claims for July 2007 and July 2008 are attributable to the fact that some claims for July 2008 may not have been processed yet. Matsumoto Dec. ¶ 5-6.

by § 30(A).

Respondent additionally argues that because the August 18, 2008 order is pending before the Ninth Circuit, and because the Ninth Circuit has not yet ruled on whether petitioners are likely to succeed on the merits, petitioners "cannot legitimately argue that they are likely to succeed on the merits of this case," because "the outcome of the pending appeals is truly uncertain." Opp'n at 12. However, respondent provides no authority, nor is the Court aware of any, which would indicate that, because a related issue has yet to be decided on appeal, that this Court is prevented from determining that petitioners have a likelihood of success on the merits.

Based on the foregoing, the Court concludes that petitioners have shown a likelihood of success on the merits.

D. IRREPARABLE HARM

Therefore, the next issue to be addressed in the current motion for preliminary injunction is whether petitioners have made a sufficient showing of the possibility of irreparable harm caused by the ten percent Medi-Cal reimbursement rate reduction to NEMT and home health services providers. After reviewing the declarations submitted by petitioners, the Court finds that petitioners have made a sufficient showing of irreparable harm to warrant an injunction.

Petitioners submit a number of declarations from NEMT and home health services providers and their representatives, which allege that the ten percent Medi-Cal reimbursement rate reduction has forced or will force NEMT and home health services providers to reduce the geographic area they are able to serve, to decline to take new Medi-Cal patients, and, in some cases, to cease furnishing services to existing Medi-Cal patients. See, e.g., Barnaby Decl. ¶ 8 ("to my personal knowledge, since the ten percent reimbursement reduction of Assembly Bill X3 5 went into effect on July 1, 2008, at least five (5) NEMT firms who were members of CMTA have ceased to serve Medi-Cal beneficiaries, and at least four (4) NEMT firms who are members of CMTA have curtailed their service areas . . ."); Colby Decl. ("as a result of the 10% Medi-Cal rate

cut, Spirit Home Healthcare will not accept any new Medi-Cal patients."); Thesman Decl. ¶ 4 ("After July 1, 2008 when the 10% rate cut went into effect, Care Van discontinued service to a few patients who lived outside our core areas of service."); Donley Decl. ¶ 4 ("In light of the 10% Medi-Cal payment rate reduction, Assisted Healthcare is no longer accepting new Medi-Cal patients."); Erman Decl. ("In light of the 10% Medi-Cal repayment reduction . . . Rx Staffing & Home Care, Inc. has given notice to three Medi-Cal patients . . . That [it] will be unable to continue to provide home health care service to them."); Horne Decl. ¶ 8 ("Our office received requests for transportation services for 25 patients in the first week of September, and approximately the same number of requests each week since then . . . We are unable to provide services to those patients due [in part] to the 10% reduction.. ."); Hafkenschiel Decl. ¶ 5; Barret Decl. at 2. These declarations also state that some providers have or may in the future be forced to close their business. See, e.g., Dermendjian Decl. ¶ 6 ("if [the 10% cut is] continued . . . We will soon be forced to completely close down the business and stop providing our [NEMT] services for our patients."); Barnaby Decl. ¶ 8; Hafkenschiel Decl. ¶ 5. In addition, petitioners submit the declaration of Henry Zaretsky, who conducted an analysis for CAHSAH and found that "the 10-percent payment reduction can do nothing but exacerbate the already significant payment shorfalls facing home-health agencies, which are likely to result in even fewer agencies available to Medi-Cal beneficiaries in need of their services." Zaretsky Decl. ¶ 9.

Respondent is correct that evidence that NEMT and home health services providers are experiencing monetary injury due to the ten percent rate reduction does not, alone, establish irreparable harm, as the Ninth Circuit has held that "monetary injury is not normally considered irreparable." See L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 634 F.2d 1197, 1202 (9th Cir.1980); Opp'n at 16. However, the statements quoted above from petitioners' declarations establish not only that NEMT and home health services are experiencing monetary injury, but also that such injury is resulting or may imminently result in a loss of access to NEMT and home health

services for Medi-Cal beneficiaries. Such loss of access may force some Medi-Cal beneficiaries to enter nursing facilities or hospitals and to use hospital emergency rooms and ambulance services more frequently. See, e.g., Colby Decl. ¶ 8 ("With the 10% cuts, many patients are not going to be able to find an agency to take care of them . . . patients must often be readmitted to the hospital because of the lack of available home health nursing care."); Horne Decl. ¶ 9 (effect of denial of requests for transportation services is that "patients will be getting a lot sicker and will be forced to use hospital emergency rooms for their needed care."); Malofsky-Berlowe Decl. ¶ 4; Vescovo Decl. ¶ 9; Eshaghian Decl. ¶ 8.

Indeed, petitioners also submit evidence that the curtailment of services provided by NEMT and home health services providers has already prevented altogether some Medi-Cal beneficiaries from obtaining needed services. For example, the president of CAHSAH's states that "thousands of Medi-Cal recipients, in the Medi-Cal fee-for-service program, who were formerly receiving life-necessary home health services in their homes before July 1, 2008 are now unable, and will continue to be unable, to access or obtain home health services in the Medi-Cal fee-for-service program." See Hafkenschiel Decl. ¶ 5. Similarly, Diane Brabetz, owner of At Home Nursing Services, and Kenneth Erman, administrator for RX Staffing & Home Care, Inc., state that at least some prospective patients that their organizations declined to accept as new patients have been subjected to longer terms of institutional care. Brabetz Decl. ¶ 6; Erman Decl. ¶ 6.

Therefore, the Court finds that, based on the declarations, petitioners have shown a threat of irreparable harm, as well as some evidence that some Medi-Cal beneficiaries are currently experiencing irreparable harm.[8]

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[8] Respondent submits the Matsumoto declaration, who states that the number of paid claims for Medi-Cal covered NEMT and home health services in July 2008 is comparable to the number of paid claims for July 2007, indicating, respondent argues, that there has (continued...)

E. BALANCE OF HARDSHIPS

The Court is mindful of the difficulty facing the State of California in light of its fiscal crisis. However, the State has accepted federal funds under the Medicaid Act. In so doing, the State agreed to abide by the conditions imposed by Congress. Further, retroactive relief for Medi-Cal beneficiaries will likely be inadequate and, and it will come too late, to remedy the hardships they may experience due to loss of NEMT and home health services, including increased institutionalization. See e.g., Lopez v. Heckler, 713 F.2d 1432, 1437 (9th Cir. 1983). In light of the significant threat to the health of Medi-Cal recipients that reducing payments to NEMT and home health providers will likely cause, and given that nothing in this Court's order prevents respondent from imposing a rate reduction after she has appropriately considered and applied the relevant factors, the Court finds that the balance of hardships tips in favor of granting the preliminary injunction.

F. PUBLIC INTEREST

"The district court's public interest analysis should be whether there exists some critical public interest that would be injured by the grant of preliminary relief." Hybritech Inc. v. Abbott Laboratories, 849 F.2d at 1446, 1458 (Fed. Cir. 1988). Clearly, there is a public interest in ensuring that the State has enough money to meet its financial obligations in the face of competing demands. However, there is also a public interest in ensuring access to health care. In light of all the circumstances, including the fact that the State may decide to implement a rate change upon making a properly reasoned and supported analysis, the Court finds that the public interest does not weigh

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[8](...continued)
not been a reduction in NEMT and home health services provided to Medi-Cal beneficiaries. Matsumoto Decl. ¶ 6. However, this argument, alone, does not defeat petitioners' showing that many providers are being forced to curtail services to Medi-Cal beneficiaries, particularly given that the data submitted by petitioners is for services provided over three months ago, when the full effect of the rate reduction might not yet have been felt by NEMT and home health services providers.

against the issuance of a preliminary injunction.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS petitioners' third motion for preliminary injunction. The Court hereby orders respondent Director, her agents, servants, employees, attorneys, successors, and all those working in concert with her to refrain from enforcing Cal. Welf. & Inst. Code § 14105.19(b)(1), including refraining from reducing by ten percent payments under the Medi-Cal fee-for-service program for NEMT and home health services provided on or after November 17, 2008.[9]

IT IS SO ORDERED.

Dated: November 17, 2008

Christina A. Snyder

CHRISTINA A. SNYDER
UNITED STATES DISTRICT JUDGE

[9] Petitioners request an injunction for services provided on or after October 27, 2008, the date upon which petitioners filed the instant motion. Petitioners argue that, in removing the instant action to federal court, the state waived its Eleventh Amendment rights, and therefore retroactive relief may be granted. Reply at 8, citing Embry v. King, 361 F.3d 562, 566 (9th Cir. 2004). However, as it did in its August 18, 2008 order granting in part petitioners' motion for preliminary injunction, the Court declines to provide retroactive relief in the instant action.