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(continued on following page)

10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA

13 JERRY THOMAS, by and through his
guardian ad litem BEVERLY
14 THOMAS, ARTHUR CONGDON,
15 SEAN BENISON,

16 Plaintiffs,

17 v.

17 TOBY DOUGLAS, Director of the
Department of Health Care Services,
18 State of California DEPARTMENT OF
19 HEALTH CARE SERVICES,

20 Defendants.

CASE NO. **CV 14-08013**

**COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF**

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CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES

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28 *Thomas v. Douglas: Complaint for Injunctive and Declaratory Relief*

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1 **I. INTRODUCTION**

2 1. This civil rights action seeks declaratory and injunctive relief to
3 authorize critically needed Medi-Cal funded in-home services to Plaintiffs Jerry
4 Thomas, Arthur Congdon and Sean Benison. Failure to receive these services will
5 result in severe harm and potential institutionalization of these individuals with
6 disabilities. Due to their fragile medical conditions, placement in an institution is
7 likely to result in dire health consequences and even death. Institutional care for
8 Plaintiffs would also cost the State significantly more than it would to keep them
9 safely in their own homes.

10 2. Plaintiffs have severe disabilities and chronic medical conditions:
11 Plaintiff Jerry Thomas is diagnosed with Progressive Supranuclear Palsy and Post-
12 Polio Syndrome. Plaintiffs Arthur Congdon and Sean Benison have advanced
13 hereditary progressive Muscular Dystrophy. Due to their illnesses, Plaintiffs are
14 quadriplegic and cannot breathe or move on their own. They have tracheal tubes
15 connected to ventilators to help them breathe. Plaintiffs Thomas and Congdon
16 receive nutrition and hydration via Gastrostomy feeding tubes.

17 3. All three Plaintiffs live in their own homes, with round the clock care
18 provided by a combination of licensed nurses, and unskilled paid and unpaid
19 attendants. However, pursuant to their doctors' orders, Plaintiffs Thomas and
20 Congdon need 24 hour nursing care, and Plaintiff Benison needs additional nursing
21 care, to assess and address their complex and unpredictable needs, including
22 monitoring their ventilators and oxygen levels, preparing and administering
23 medications, and clearing fluids from their lungs and tracheotomy tubes.

24 4. While this kind of intensive nursing care is often provided in a hospital
25 or Subacute medical care facility, Plaintiffs have been able to remain in their
26 communities and close to their families because of nursing care available to them in
27 their homes under the Medi-Cal Home and Community Based Nursing
28 Facility/Acute Hospital Waiver ("NF/AH Waiver"), administered by Defendants

1 Department of Health Care Services and its Director, Toby Douglas ("DHCS" or
2 "Defendants").

3 5. Plaintiffs have all requested additional licensed nursing care services
4 from Defendants, so that they can continue living safely in their homes and
5 communities. Defendants have denied these requests.

6 6. Plaintiff Benison, who lives alone, also requires Case Management and
7 Habilitation services, which are available under the NF/AH Waiver. However, Mr.
8 Benison is not able to access these needed NF/AH Waiver services that would help
9 him live more independently and successfully in his home and community.

10 7. The sole reason Plaintiffs are not able to get these critically needed
11 services is because Defendants have placed arbitrary cost limitations on services
12 available under the NF/AH Waiver. Specifically, for individuals like Plaintiffs who
13 have been determined to meet the Subacute level of care, Medi-Cal would pay
14 \$271,697 per year for institutional placement in a Subacute facility; however,
15 Defendants have capped the budget for comparable in-home services funded
16 through the NF/AH Waiver at \$180,219 per year, which is at least \$90,000 below
17 the actual cost of equivalent care in a Subacute facility. The cost of the additional
18 nursing and other NF/AH Waiver services requested by Plaintiffs would still cost
19 less than placement in a Subacute facility. Defendants have the discretion and the
20 ability to modify the NF/AH Waiver to enable Plaintiffs to receive the skilled
21 nursing care and other services they need to remain safely at home. But, they have
22 refused to provide critically needed services on grounds it exceeds their arbitrary
23 cost-cap.

24 8. Defendants' actions violate the Americans with Disabilities Act of
25 1990, 42 U.S.C. § 12312 ("ADA") and Section 504 of the Rehabilitation Act of
26 1973, 29 U.S.C. § 794 ("Section 504"). Under the ADA and Section 504, a public
27 agency such as DHCS has a duty to provide services to people with disabilities in
28 the "most integrated setting appropriate to their needs" and to prevent unnecessary

1 institutionalization. The most integrated setting for Plaintiffs is to continue living in
2 their homes in the community, with adequate NF/AH Waiver services to meet their
3 significant needs. Placing Plaintiffs at risk of unnecessary institutionalization in
4 order to receive the care they need violates the ADA.

5 9. Under the ADA, Defendants also have an obligation to use methods of
6 administration that do not discriminate against individuals with disabilities such as
7 Plaintiffs. Defendants' failure to ensure that Plaintiffs are provided with adequate
8 NF/AH Waiver services to continue living safely in their homes, and their decision
9 to set funding levels for services that are biased in favor of institutional care results
10 in discrimination against Plaintiffs in the administration of the Medi-Cal program.

11 **II. JURISDICTION**

12 10. This is an action for declaratory and injunctive relief for violations of
13 Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 and Section 504
14 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

15 11. Jurisdiction is based on 28 U.S.C. §§ 1331 and 1343. Plaintiffs' claims
16 for declaratory and injunctive relief are authorized under 28 U.S.C. §§ 2201 and
17 2202. At all times relevant to this action, Defendants have acted under color of state
18 law.

19 **III. VENUE**

20 12. Venue is proper in the Central District of California pursuant to 28
21 U.S.C. § 1391(b), because the Defendants operate and perform their official duties
22 therein and thus reside therein for purposes of venue, and because a substantial part
23 of the events or omissions giving rise to the claims herein occurred in the Central
24 District of California. Plaintiff Jerry Thomas lives and receives Medi-Cal services
25 in Orange County, which is in the Central District of California. Plaintiff Arthur
26 Congdon lives and receives Medi-Cal services in Los Angeles County, which is in
27 the Central District of California. Plaintiff Sean Benison lives and receives Medi-
28 Cal services in Ventura County, which is in the Central District of California.

1 Defendant DHCS operates the Medi-Cal program, conducts business and provides
2 Medi-Cal services to Plaintiffs in Orange County, Los County and Ventura County,
3 all in the Central District of California.

4 **IV. PARTIES**

5 **Plaintiffs**

6 13. Each Plaintiff is a “qualified person with a disability” within the
7 meaning of all applicable statutes, including 42 U.S.C. §12131(2) and 29 U.S.C.
8 §705(20)(B). Plaintiffs have been and continue to be Medi-Cal beneficiaries.

9 14. Plaintiff Jerry Thomas is 73 years old and has Progressive Supranuclear
10 Palsy (“PSP”), a degenerative brain disorder that causes serious and progressive
11 problems with gait and balance, eye movement, cognitive difficulties, and muscle
12 weakness, and which will worsen over time. In addition to PSP, Mr. Thomas has
13 Post-Polio Syndrome, quadriplegia, chronic pain syndrome, dysphagia (difficulty
14 swallowing), chronic respiratory failure, chronic constipation, chronic atelectasis (a
15 complete or partial collapse of the lung), recurrent episodes of urinary tract
16 infections (“UTIs”), recurrent pneumonia and/or bronchitis, and hypothyroidism,
17 among other conditions. After 14 years of institutional placement, Mr. Thomas now
18 resides at home with his wife of over 30 years, Beverly Thomas, who brought him
19 home from a Subacute facility in 2013. She serves as his Guardian ad Litem in this
20 litigation.

21 15. Plaintiff Arthur Congdon is 36 years old and has advanced hereditary
22 progressive Duchenne Muscular Dystrophy, chronic respiratory failure, congestive
23 heart failure, cardiomyopathy, is quadriplegic and legally blind. Mr. Congdon also
24 suffers from insomnia, chronic back pain, gastric problems and severe contracture of
25 his joints. He resides at home with his mother, who is his primary caregiver.

26 16. Plaintiff Sean Benison is 43 years old and has advanced hereditary
27 progressive Becker Muscular Dystrophy, is quadriplegic, has chronic respiratory
28 failure, chronic obstructive pulmonary disease, chronic pain disorder, anxiety

1 disorder, DVT (thromboembolism) prophylaxis and reflux esophagitis. He lives on
2 his own in his apartment, after leaving two years of institutional care in a Subacute
3 facility in October 2013.

4 17. All three Plaintiffs have a tracheal tube that is connected to a
5 ventilator to help them breathe. Due to Plaintiffs' mucous secretions and their
6 inability to swallow due to the tracheotomy and loss of muscle function, Plaintiffs
7 must be suctioned as needed, sometimes as frequently as four to five times an hour,
8 when saliva builds up in the mouth, nose, and throat to avoid pooling of mucous or
9 any fluid in the lungs. If fluid does go into the lungs, it could impair oxygen
10 exchange, resulting in lack of oxygen and permanent damage to organs (including
11 brain injury), pneumonia, and infection. Plaintiffs Congdon and Benison use a
12 cuffed tracheotomy which is uncuffed during the day and allows for the possibility
13 of communication/speech, but also allows fluid to go into the lungs if not timely
14 suctioned. During the night, the tracheotomy is cuffed and Plaintiffs are not able to
15 speak – which can be more dangerous since they are not able to communicate if they
16 are in distress. Further, air leaks out of the cuff and a nurse is required to keep
17 adding air to the cuff and to monitor the ventilator settings to ensure Plaintiffs are
18 properly ventilated: too much air puts pressure on the lungs and too little air can
19 make them unconscious. All this is done through the night while Plaintiffs are
20 asleep.

21 18. Plaintiffs are dependent on a wheelchair for mobility at all times.
22 Plaintiffs Thomas and Congdon also have Gastrostomy tubes (“G-tube”) for feeding
23 and medication administration. Plaintiffs are completely dependent on medical
24 technologies for survival. Plaintiffs cannot move, turn, feed, dress, bathe or take
25 care of themselves. They need total care for every daily activity.

26 19. Plaintiffs' in-home nursing care is provided by licensed vocational
27 nurses (“LVNs” or “nurses”). LVNs are licensed to provide skilled nursing care in
28 many settings including hospitals. 42 C.F.R. Sec. 409.31 (a); 22 C.C.R. §§

1 70055(a)(16), §70055(a)(16) & 70217 (a). These one-on-one skilled nursing
2 services have been ordered by Plaintiffs’ physicians because their care requires the
3 exercise of judgment informed by experience and expertise in addressing the care
4 needs of persons with severe disabilities and chronic illnesses. The services
5 Plaintiffs require cannot safely be provided by untrained or unskilled individuals
6 and are medically necessary.

7 **Defendant Department of Health Care Services**

8 20. Defendant California Department of Health Care Services (“DHCS”)
9 administers the California Medicaid program, called “Medi-Cal.” DHCS is the
10 single state agency responsible for the administration of the Medi-Cal program.

11 21. Defendant Toby Douglas is DHCS’ current Director and is sued only in
12 his official capacity. Director Douglas is responsible for directing, organizing, and
13 administering the Medi-Cal program, including Medi-Cal Home and Community
14 Based Services Waivers, in accordance with all applicable laws and regulations. As
15 such, he is responsible for DHCS’ compliance with state and federal laws governing
16 the Medi-Cal program.

17 **V. STATUTORY AND REGULATORY FRAMEWORK**

18 **A. THE MEDICAID PROGRAM**

19 22. Medicaid is a joint federal and state medical assistance program for
20 certain groups of low-income people, including children. 42 U.S.C. §§ 1396-1396v.
21 California has elected to participate in the Medicaid program, and so must comply
22 with the requirements of the federal Medicaid Act and its implementing regulations.
23 California’s Medicaid program is known as “Medi-Cal.”

24 23. The purpose of Medicaid is to furnish, as far as practicable, “medical
25 assistance on behalf of . . . aged, blind or disabled individuals, whose income and
26 resources are insufficient to meet the costs of necessary medical services” and “to
27 help such families and individuals to attain or retain capability for independence or
28 self-care” 42 U.S.C. § 1396.

1 24. Participating States are reimbursed by the federal government for a
2 portion of the cost of providing Medicaid benefits. *See* 42 U.S.C. § 1396b. The
3 remaining funding for the Medi-Cal program comes from the State and from
4 counties.

5 25. States participating in Medicaid must designate a “single state agency”
6 to administer or supervise the administration of the Medicaid program. 42 U.S.C. §
7 1396a(a)(5). DHCS is the single state agency so designated in California.

8 26. The California Medi-Cal program provides an array of medical
9 services, treatments, and therapies that are authorized based on individuals’ meeting
10 “medical necessity” criteria. Welf. & Inst. Code §§ 14059, 14059.5, 14133.3; 22
11 California Code of Regulations (“C.C.R.”) § 51303(a).

12 **Medi-Cal Home and Community-Based Services Waivers**

13 27. The Centers for Medicare and Medicaid (“CMS”) is the federal agency
14 that oversees the administration of the Medicaid programs offered by each state.
15 CMS has the authority to waive certain provisions of federal Medicaid law to allow
16 states to provide home and community-based services (“HCBS”) in lieu of
17 institutional care, for targeted groups of individuals who otherwise would require
18 care in a medical facility. 42 U.S.C. § 1396n(c)(1).

19 28. States may receive federal financial participation for such HCBS
20 “waiver” services to the same extent as provided to other Medicaid services offered
21 by the State. CMS approves or denies a state’s HCBS waiver application and must
22 approve any amendments to an approved waiver application. *Id.*

23 29. DHCS has been mandated by the Legislature to “seek all necessary
24 waivers . . . in order to provide in-home and community-based care.” Welf. & Inst.
25 Code §§ 14132(t), 14137. DHCS routinely seeks and secures approval to renew
26 and amend HCBS Waivers within permissible federal limitations.

27 30. HCBS Waivers in California include the Nursing Facility/Acute
28 Hospital (“NF/AH”) Waiver. The purpose of the NF/AH Waiver is to provide

1 Medi-Cal beneficiaries with long-term medical conditions who meet one of the
2 designated "levels of care" described below, the option of returning to and/or
3 remaining in their homes or home-like community settings in lieu of
4 institutionalization.

5 <http://www.dhcs.ca.gov/services/ltc/Documents/NFAH%20Transition%20and%20D>
6 [iversion%20Waiver%2012-1-2012.pdf](http://www.dhcs.ca.gov/services/ltc/Documents/NFAH%20Transition%20and%20D) ("NF/AH Waiver") at 7-8.

7 31. In seeking federal approval for the NF/AH Waiver, DHCS gave
8 assurances to CMS, including that: (a) Necessary safeguards have been taken to
9 protect the health and welfare of participants receiving services under the NF/AH
10 Waiver; and, (b) Plans of Care are responsive to NF/AH Waiver participants' needs.
11 NF/AH Waiver at 9-10.

12 32. Under the umbrella of the NF/AH HCBS Waiver, DHCS administers
13 three HCBS waivers which each correspond to an institutional level of care. These
14 levels of care are: Nursing Facility Level A or B ("NF-A/B"), Nursing Facility
15 Subacute ("Subacute"), and Acute Hospital. Each of the three HCBS Waivers
16 contained in the NF/AH Waiver offers an array of home and community-based
17 services, discussed below.

18 33. The level of care criteria for the NF/AH Home and Community Based
19 Services Waivers explicitly describe the type and level (or severity) of functional
20 limitations and/or skilled nursing needs an individual must have to be admitted to an
21 institutional setting. Upon meeting those eligibility criteria, or level of care, an
22 individual may qualify for corresponding NF/AH HCBS Waiver services.

23 34. California offers various services under the NH/AH Waiver, including
24 Private Duty Nursing, Case Management and Habilitation services that Plaintiffs are
25 seeking. NF/AH Waiver at 59.

26 35. "Private duty nursing" services means individual and continuous care
27 (in contrast to part-time or intermittent care) provided by a licensed nurse or a
28 certified home health aide employed by a home health agency within the scope of

1 state law. Private duty nursing services are provided in a recipient’s home, home-
2 like environment or an approved out-of-home setting. 42 U.S.C. § 1396d(a)(9); 42
3 C.F.R. § 440.90; NF/AH Waiver at 196.

4 36. “Case Management” services are designed to assess the participant and
5 determine the need for medical, psycho-social, social and other services and to assist
6 participants in gaining access to those needed services, regardless of the funding
7 source, to ensure the participant’s health and safety and support of his/her home and
8 community-based program. Case Managers also assist in securing personal care
9 providers, work with the participant and his/her physician in developing goals and
10 identifying a course of action to respond to the assessed needs of the individual, as
11 well as oversee the implementation of the services described in the Plan of
12 Treatment (“POT”). Case Management responsibilities include assessing, care
13 planning, locating, coordinating, and monitoring services for community-based
14 participants on the waiver. Case Management may be provided by an array of
15 provider types. NF/AH Waiver at 59-72.

16 37. “Habilitation Services” are provided in a participant’s home or an out-
17 of-home non-facility setting and are designed to assist the participant in acquiring,
18 retaining, and improving self-help, socialization, and adaptive skills necessary to
19 reside successfully in the person’s natural environment. Habilitation services
20 include training on: the use of public transportation; personal skills development in
21 conflict resolution; community participation; developing and maintaining
22 interpersonal relationships; personal habits; daily living skills (cooking, cleaning,
23 shopping, money management) and community resource awareness to support
24 independence in the community. It also includes assistance with: selecting and
25 moving into a home; locating and choosing suitable housemates; locating household
26 furnishings; settling disputes with landlords; managing personal financial affairs;
27 recruiting, screening, hiring, training, supervising, and dismissing personal
28 attendants; dealing with and responding appropriately to governmental agencies and

1 personnel; asserting civil and statutory rights through self-advocacy, and building
2 and maintaining interpersonal relationships. NF/AH Waiver at 72-84.

3 38. In order to meet the federal cost-neutrality requirements, the NF/AH
4 Waiver contains assurances that, in the aggregate for the entire NF/AH Waiver
5 population, services provided in the community pursuant to the NF/AH Waiver will
6 not exceed the cost of services in the institution designated for comparable care.
7 NF/AH Waiver at 10. Defendants, however, have chosen to use an individual
8 maximum benefit level, rather than an aggregate cost-cap. *Id.* at 26. Thus, the three
9 Waivers within the NF/AH HCBS Waiver correspond to an institutional level of
10 care and have individual “cost-caps” depending on the Medi-Cal rate for their
11 corresponding facility. These cost-caps allow a qualifying individual to choose
12 from a menu of available home and community-based services but only up to the
13 cost-cap for his or her level of care set by DHCS in the applicable HCBS Waiver.
14 NF/AH Waiver at 26-27. Defendants have set these Waiver cost caps at a level far
15 below the institutional cost.

16 39. Upon information and belief, the Medi-Cal program pays \$271,697 per
17 year to Subacute facilities for adults who are placed in those institutions.

18 40. However, Defendants will not authorize a comparable level of HCBS
19 waiver funding for home-based services for individuals such as Mr. Thomas, Mr.
20 Congdon and Mr. Benison who meet the Subacute criteria and would otherwise be
21 placed in a Subacute facility. This is because Defendants have arbitrarily set the
22 cost-cap for NF/AH Waiver services at the adult Subacute level of care at \$180,219,
23 which is more than \$90,000 below the actual cost of the comparable institutional
24 placement. NF/AH Waiver at 27.

25 41. Federal cost-neutrality requirements do not prohibit Defendants from
26 setting the Waiver cost-cap at or just below the rate paid to Subacute facilities, or
27 even exceeding the amount paid to Subacute facilities so long as in the aggregate,
28 the State’s Medi-Cal spending remains cost-neutral.

In-Home Supportive Services

42. The In-Home Supportive Services (“IHSS”) program is the State’s personal attendant care program pursuant to Cal. Welf. & Inst Code §§ 12300 et seq. and Welf. & Inst. Code §§ 14132.95, 14132.951, 14132.952. The IHSS program pays for certain services so eligible recipients can remain safely in their homes. To be eligible, an individual must be over 65 years of age, or disabled, or blind. IHSS services include: housecleaning, meal preparation, laundry, grocery shopping, personal care services (such as bowel and bladder care, bathing, grooming and paramedical services), accompaniment to medical appointments, and protective supervision for the mentally impaired. Recipients may choose their IHSS workers, who must meet minimal requirements for approval, such as a background check, but who are not required to be licensed or skilled medical practitioners.

B. FEDERAL ANTI-DISCRIMINATION LAWS

43. Qualifying individuals with disabilities are protected from disability discrimination, including segregation in institutions, by the ADA and Section 504.

44. In enacting the ADA, Congress found that “[i]ndividuals with disabilities continually encounter various forms of discrimination, including...segregation...” 42 U.S.C. § 12101(a) (5). Title II of the ADA provides that “no qualified individual with a disability shall, by reason of disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity or be subjected to discrimination by such entity.” 42 U.S.C. § 12132.

45. Regulations implementing Title II of the ADA provide: “[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” 28 C.F.R. § 35.130(d) (1991); *see also* Section 504, 29 U.S.C. §§ 794-794a; 28 C.F.R. § 41.51(d). Further, “[t]he most integrated setting appropriate to the needs of a qualified individual with a disability means a setting that enables individuals with

1 disabilities to interact with non-disabled persons to the fullest extent possible.” 28
2 C.F.R. pt. 35, App. A, p. 450 (1998).

3 46. The United States Supreme Court in *Olmstead v. L.C. ex rel. Zimring*,
4 527 U.S. 581 (1999) held that the unnecessary institutionalization of individuals
5 with disabilities is a form of discrimination under Title II of the ADA. In doing so,
6 the Court interpreted the ADA’s “integration mandate” as requiring persons with
7 disabilities to be served in the community when: (1) the state determines that
8 community-based treatment is appropriate; (2) the individual does not oppose
9 community placement; and (3) community placement can be reasonably
10 accommodated. *Olmstead*, 527 U.S. at 607.

11 47. Regulations implementing Title II of the ADA and Section 504 also
12 provide: “A public entity may not, directly or through contractual or other
13 arrangements, utilize criteria or other methods of administration: (i) that have the
14 effect of subjecting qualified individuals with disabilities to discrimination on the
15 basis of disability; [or] (ii) that have the purpose or effect of defeating or
16 substantially impairing accomplishment of the objectives of the entity’s program
17 with respect to individuals with disabilities...” 28 C.F.R. § 35.130(b)(3); 28 C.F.R.
18 § 41.51(b)(3)(I); 45 C.F.R. § 84.4(b)(4).

19 48. ADA regulations further provide: “[a] public entity shall not impose or
20 apply eligibility criteria that screen out or tend to screen out an individual with a
21 disability or any class of individuals with disabilities from fully and equally
22 enjoying any service, program, or activity, unless such criteria can be shown to be
23 necessary for the provision of the service, program, or activity being offered.” 28
24 C.F.R. § 35.130(b)(8); *see also* parallel Section 504 regulations, 45 C.F.R.
25 § 84.4(b)(1)(iv).

26 49. As set forth in federal regulations: “[a] public entity shall make
27 reasonable modifications in policies, practices, or procedures when the
28 modifications are necessary to avoid discrimination on the basis of disability, unless

1 the public entity can demonstrate that making the modifications would
2 fundamentally alter the nature of the service, program, or activity.” 28 C.F.R.
3 § 35.130(b)(7).

4 **VI. FACTUAL ALLEGATIONS**

5 **JERRY THOMAS**

6 50. Jerry Thomas was diagnosed with Progressive Supranuclear Palsy in
7 2007 at 66 years of age. Progressive Supranuclear Palsy is a degenerative brain
8 disorder that involves a loss of muscle control impacting gait and balance, eye
9 movement, and thought processes.

10 51. Mr. Thomas’s in-home nursing services have been funded entirely by
11 Medi-Cal.

12 52. Mr. Thomas lives at home with wife of over thirty years, Beverly
13 Thomas. Mr. Thomas’s wife is his primary care giver and his Guardian ad Litem.

14 53. Before Mr. Thomas became ill, he worked as a road manager for his
15 brother, singer BJ Thomas. When he was not spending time with his wife or
16 working, most weekends Mr. Thomas was hunting with his dogs and family
17 members.

18 54. Mr. and Mrs. Thomas desire that he continue living at home with
19 appropriate nursing services.

20 55. Mr. Thomas is medically fragile and technology dependent. Mr.
21 Thomas requires oxygen 24 hours a day and is connected to a ventilator at least 18
22 hours a day, and more when needed. He receives nutrition, hydration and
23 medication through his G-tube. Mr. Thomas is non-ambulatory and cannot bear
24 weight. He uses a wheelchair and requires assistance with all activities of daily
25 living (“ADLs”).

26 56. Mr. Thomas can no longer speak and is only able to communicate by
27 blinking his eyes. Individuals need training to understand his body language for
28 signs and symptoms of changes in his condition, need, and medical emergencies.

1 57. At age 66, when Mr. Thomas could no longer breathe on his own due
2 to muscle weakness, he had a tracheotomy.

3 58. In order to control his symptoms and severe pain, he takes over 40
4 medications, including several narcotics and 7 medications that are provided pre re
5 nata (“PRN” as needed).

6 59. In addition to PSP, Mr. Thomas has been diagnosed with Post Polio
7 Syndrome, among other conditions.

8 60. Mr. Thomas lived in a nursing facility for fourteen years, until his wife
9 was able to bring him home with services under the NF/AH Waiver. Since moving
10 home on April 1, 2013, Mr. Thomas has been in the hospital or hospitalized several
11 times, as well as seen by his doctors on numerous occasions. Mr. Thomas is
12 regularly seen by his pulmonologist and primary care physician, as well as a
13 neurologist.

14 61. Since Mr. Thomas moved home, his condition has worsened due to the
15 natural progression of his diseases. He now requires more time connected to the
16 ventilator and takes additional medications to assist with his digestive and
17 tracheotomy suctioning needs. In July 2014, Dr. Kayaleh, Mr. Thomas’s treating
18 physician, ordered for him to be provided with 24 hour nursing care.

19 62. Mrs. Thomas is not a licensed vocational nurse and is not capable of
20 providing the additional nursing care that Mr. Thomas requires.

21 **Mr. Thomas’ Nursing Care Needs**

22 63. As set forth in his Plan of Treatment approved by his physician, Mr.
23 Thomas has frequent, ongoing, and unpredictable skilled care needs that must be
24 addressed by a licensed nurse. These include, e.g.,: monitoring Mr. Thomas’
25 oxygen saturation levels and providing skilled interventions when his oxygen levels
26 drop below 92%, including breathing with ambu-bag, CPR, and calling 911;
27 determining when Mr. Thomas must be placed on the ventilator during sprinting
28 hours; monitoring and administering his medications including over 40 daily

1 medications and 7 medications to be taken PRN as needed for proper dosage,
2 effectiveness, interactions, and side effects; monitoring the amount, sound, and color
3 of Mr. Thomas' secretions for signs of infection; monitoring the sound of Mr.
4 Thomas' lungs to assess for a respiratory infection or blockage; monitoring and
5 performing deep tracheal suctioning; monitoring the color, consistency, odor, and
6 frequency of Mr. Thomas' urine and bowels for signs and symptoms of infections;
7 administering and checking all equipment to ensure proper functioning and replace
8 equipment or intervene as needed; monitoring feeding tolerance and knowing when
9 Mr. Thomas' G-tube feeding should be stopped when he presents signs of
10 abdominal pain and discomfort; monitoring, caring for, and replacing his trach
11 stoma when necessary; taking and interpreting vital signs and knowing when they
12 indicate a possible infection or when CPR is required; monitoring Mr. Thomas'
13 entire system for signs of infection, change, or emergency; assessing and monitoring
14 Mr. Thomas' skin for signs of infection, breakdown, or ulcers; and identifying and
15 responding to emergencies.

16 **In-Home Nursing Authorization**

17 64. Before moving home from Chapman Subacute facility on April 1,
18 2013, Mr. Thomas was approved to receive 450 LVN hours under the NF/AH
19 waiver at the Subacute level of care, along with 240.04 hours of IHSS, and 2 hours
20 of RN case management. He and his wife accepted this combination of skilled and
21 unskilled care because Mr. Thomas unquestionably required round-the-clock
22 coverage and they understood that due to the Subacute Waiver cost-cap, he would
23 not be able to receive the 24-hour nursing he needed.

24 65. On October 16, 2013, DHCS conducted a home visit to reassess Mr.
25 Thomas' level of care. Based on the assessment, DHCS determined that Mr.
26 Thomas remained eligible for the NF/AH waiver at the Subacute level of care.
27 However, DHCS determined that the expenditures for the services he was receiving
28 exceeded the NF/AH waiver cost-cap at the Subacute level of care, which is \$

1 180,219.00.

2 66. Even though Mr. Thomas' needs had increased since his move home,
3 DHCS issued a Notice of Action ("NOA") on January 9, 2014 reducing his in-home
4 LVN nursing authorization to 430 hours per month. The NOA provided that the
5 decrease in services was solely due to the cost-cap under the NF/AH waiver, not a
6 change or improvement in Mr. Thomas' condition.

7 67. On February 10, 2014, Mrs. Thomas, on behalf of her husband, timely
8 appealed DHCS' 20-hour per month nursing reduction by mail and requested aid-
9 paid-pending. At Plaintiffs' request, DHCS reassessed Mr. Thomas in August 2014,
10 but refused to authorize increased nursing hours for him. On September 23, 2014, a
11 Medi-Cal fair hearing was held, where Mr. Thomas presented his medical need for
12 24 hour nursing care, consistent with his doctor's July 2014 orders. The
13 administrative law judge has not yet issued a ruling; thus Mr. Thomas has not yet
14 experienced a reduction in his nursing care. However, because DHCS has the
15 ability to "alternate", or overturn, the decision, even a favorable ruling does not
16 offer Mr. Thomas protection from this cut. Moreover, at the hearing, Defendants
17 argued that the hearing issues should be limited to the 20-hour per month reduction,
18 and not whether Mr. Thomas was entitled to receive 24-hour per day nursing care.
19 Thus, even a favorable decision may not provide Mr. Thomas with permanent or
20 adequate relief.

21 **ARTHUR CONGDON**

22 68. Arthur Congdon is 36 years old. He was diagnosed with Duchenne
23 Muscular Dystrophy as a child. Muscular Dystrophy is a degenerative disease
24 involving advancing muscle weakness, loss of muscle tissue, and atrophy. As a
25 result of Muscular Dystrophy, Mr. Congdon is quadriplegic and uses a wheelchair.
26 Mr. Congdon also has congestive heart failure, cardiomyopathy, chronic respiratory
27 failure and is legally blind. In addition, Mr. Congdon suffers from chronic
28 insomnia, chronic back pain, gastric problems, urinary incontinence and severe

1 contracture of his joints.

2 69. Mr. Congdon lives at home with his mother, Jennifer Knight. Ms.
3 Knight is also legally blind. Ms. Knight is Plaintiff's primary caregiver, and is
4 involved in planning for and providing his care. Mr. Congdon's father lives in
5 Pennsylvania.

6 70. Mr. Congdon has a Ph.D. in Astrophysics. In October 2008, he began
7 an assignment at the prestigious Jet Propulsion Laboratory (JPL) at the California
8 Institute of Technology in Pasadena, California. He was a participant in NASA's
9 Postdoctoral Program administered by Oak Ridge Associated Universities.
10 However, due to his advancing Muscular Dystrophy, Mr. Congdon is no longer able
11 to work at JPL. Mr. Congdon now remains exclusively at home and is working on
12 an astrophysics textbook.

13 71. In March 2002, Mr. Congdon was named one of five winners nationally
14 of the Recording for the Blind and Dyslexic academic awards. To recognize his
15 accomplishment, Mr. Congdon was invited to the White House in Washington, DC,
16 where he met with then First Lady Laura Bush.

17 72. Mr. Congdon and his mother desire that he continue living at home
18 with appropriate nursing services.

19 73. Mr. Congdon's in-home nursing care has been funded entirely by
20 Medi-Cal.

21 74. Mr. Congdon is medically fragile and technology dependent. He had a
22 G-tube inserted eleven years ago. At the same time, since Mr. Congdon could no
23 longer breathe on his own due to muscle weakness, he had a tracheotomy. Mr.
24 Congdon is non-ambulatory and cannot bear weight. He uses a wheelchair.

25 75. Since that time, Mr. Congdon has been dependent on a ventilator 24
26 hours a day.

27 76. Mr. Congdon receives nutrition, hydration and medication through his
28 G-tube. He is given water three times a day, and medicines four times a day, via his

1 G-tube. His G-tube needs to be cleaned every day and flushed every time he gets
2 hydration.

3 77. Mr. Congdon needs total care for every daily activity. He cannot walk,
4 cannot move himself or even turn over in bed. He cannot feed himself and has
5 limited use of his hands.

6 78. Mr. Congdon had spinal fusion surgery in 1993. He was hospitalized at
7 Cedars Sinai for aspiration pneumonia in May 2013.

8 79. Mr. Congdon's cardiologist is at the Cedars Sinai Medical Center. His
9 primary care doctor, who also handles his pulmonary care, is with the Family
10 Medicine Center in Glendale and treats Mr. Congdon in his home. Mr. Congdon is
11 not able to travel easily and so he is unable to receive treatment from a
12 pulmonologist and a neurologist.

13 **Mr. Congdon's Nursing Care Needs**

14 80. As set forth in his Plan of Treatment approved by his physician, Mr.
15 Congdon has frequent, ongoing, and unpredictable skilled care needs that must be
16 addressed by a licensed nurse. These include: monitoring and ensuring his vital
17 signs remain within parameters listed in the physician's orders, and more frequent
18 checks if he is running a fever, or for signs or symptoms of a change in condition;
19 monitoring Mr. Congdon's respiratory function through regular interventions of
20 deep and oral suctioning, effective trach care including mobilization of lung
21 secretions, and ventilator support, and responding to signs and symptoms of
22 respiratory distress; ensuring adequate nutrition, hydration and medication is
23 provided for Mr. Congdon via his G-tube, through close monitoring; assessing the
24 G-tube site for any problems or infection; monitoring for signs and symptoms of
25 weight change, altered bowel function and dehydration; tracheotomy assessment,
26 changing, addressing problems or infections; preparing medications as prescribed;
27 monitoring Mr. Congdon's pain level and re-positioning him and administering
28 analgesics as needed; ensuring Mr. Congdon remains infection free at his trach and

1 G-tube sites and keep sites clean and dry at all times; ensuring no skin impairment
2 develops by repositioning Mr. Congdon frequently and by providing skin care every
3 shift to ensure no skin breakdown; reporting any change in Mr. Congdon's condition
4 to the physician, the RN, or others as appropriate.

5 **In-Home Nursing Authorization**

6 81. Mr. Congdon has been receiving NF/AH Waiver services since October
7 2008. He is authorized for up to 500 hours per month of licensed vocational
8 nursing, and two hours per month of RN case management. This provides him with
9 16 hours nursing coverage daily. He does not receive any IHSS attendant care.

10 82. Mr. Congdon's mother, Ms. Knight, has been trained in his care needs
11 and provides the remainder of his care each day. She also provides backup care
12 during times when Mr. Congdon's needs are so intense that two caregivers are
13 required or when the home health agency fails to staff a shift and a nurse is not
14 available.

15 83. However, Ms. Knight is unable to provide additional care for Mr.
16 Congdon. Mr. Congdon's father lives on the East Coast and is unavailable to
17 provide any caregiver duties. Moreover, since Mr. Congdon is over the age of 18,
18 neither parent has a legal obligation to provide for his care.

19 84. In June 2013, Mr. Congdon's physician ordered one-to-one nursing
20 care for him for twenty four hours per day. Accordingly, Mr. Congdon asked
21 Defendants for an additional 240 hours per month of licensed vocational nurse
22 private duty nursing. Defendants denied the request and, in lieu of the 240 hours per
23 month, only authorized Mr. Congdon an additional 20 hours per month of nursing
24 care, up to the Subacute Waiver cost-cap. Mr. Congdon did not appeal the denial
25 because he believed that doing so would be futile.

26 **SEAN BENISON**

27 85. Mr. Benison was diagnosed with progressive hereditary Becker
28 Muscular Dystrophy when he was 9 years old. Mr. Benison started using a manual

1 wheelchair when he was 13 year old and a power wheel chair at age 21. Mr.
2 Benison is quadriplegic. In addition to Muscular Dystrophy, Mr. Benison has
3 chronic respiratory failure, chronic obstructive pulmonary disease, chronic pain
4 disorder, anxiety disorder, DVT (thromboembolism) prophylaxis and reflux
5 esophagitis. Mr. Benison takes 19 different medications.

6 86. Mr. Benison is working towards a Ph.D. in Geography at the University
7 of California, Santa Barbara (“UCSB”). He has a B.A. from California State
8 University Northridge. He has a Master’s degree in Geography from UCSB.

9 87. Mr. Benison lives in an apartment in Ventura, California with a live-in
10 IHSS personal care worker. Mr. Benison’s father, Edward Benison, does not
11 provide any daily care but involved in planning for and providing his care.

12 88. Mr. Benison and his family desire that he continue living at home with
13 appropriate nursing services.

14 89. Mr. Benison’s nursing care has been funded entirely by Medi-Cal.

15 90. While a student at UCSB, Mr. Benison was living in campus housing
16 and had an IHSS care worker assisting with his needs. Mr. Benison also had close
17 friends who helped with his care needs, which enabled Mr. Benison to enroll in and
18 pursue graduate studies.

19 91. In November 2011, while a student at UCSB, Mr. Benison’s health
20 took a turn for the worse. Mr. Benison had a severe attack of pneumonia and was
21 hospitalized at the Goleta Valley Cottage Hospital in Santa Barbara. He remained in
22 the Subacute unit of the acute care hospital for two years before he moved out to his
23 current apartment. While in the hospital, Mr. Benison had to undergo a
24 tracheostomy due to the pneumonia and neuromuscular and lung weakness caused
25 by the Muscular Dystrophy. Mr. Benison could no longer breathe on his own. Mr.
26 Benison is now dependent on a ventilator 24 hours a day.

27 92. Mr. Benison is medically fragile and technology dependent. Mr.
28 Benison is non-ambulatory and cannot bear weight. He uses a wheelchair for

1 mobility. Until a few months ago, he had a G-tube for feeding and medication. Mr.
2 Benison cannot walk, cannot move himself or even turn over in bed. He cannot feed
3 himself and has limited use of his hands. He requires assistance with all activities of
4 daily living.

5 93. Mr. Benison has been on the NF/AH Waiver since October 2013 when
6 he moved out of the Subacute facility and into his own apartment in the community.
7 At that time, DHCS authorized 416 hours per month of Medi-Cal funded one-to-one
8 in-home, or “private duty” nursing care through the NF/AH Waiver, based on its
9 determination that Mr. Benison met the Subacute level of care. In order to remain
10 within the cost-cap limitation at the Subacute level of care, he is authorized for 16
11 hours nursing coverage daily from Monday through Friday, and 8 hours of nursing
12 coverage each on Saturdays and Sundays. Mr. Benison requires 24-hour care, and
13 because he lives alone, Mr. Benison supplements his nursing care with 260 hours of
14 unlicensed IHSS personal care aide hours per month. However, on weekends he
15 does not have any nursing coverage for 16 hours each day, which leaves him at risk.
16 Hence, a minimum of 8 hours more of private duty nursing each on Saturday and
17 Sunday is necessary to keep Mr. Benison safely in his home.

18 **Mr. Benison’s Nursing Care Needs**

19 94. As set forth in his Plan of Treatment approved by his physician, Mr.
20 Benison has frequent, ongoing, and unpredictable skilled care needs that must be
21 addressed by a licensed nurse. These include: monitoring Mr. Benison’s vital signs,
22 cardiac status and assessing for signs and symptoms of tachycardia (resting heart
23 rate faster than normal), ensuring Mr. Benison’s vital signs remain within
24 parameters listed in the physician’s orders, and instructing caregivers in proper vital
25 sign monitoring; assessing for signs and symptoms of pain; assessing for signs and
26 symptoms of skin breakdown, rash and perfusion; instructing caregivers in measures
27 to protect skin integrity; assessing for medication compliance, effectiveness and
28 complications and instructing caregivers in medication dosages, schedules, effects

1 and side effects, and any food and drug interactions; assessing Mr. Benison's level
2 of consciousness, motor and sensory reflexes, and for progression of his muscular
3 dystrophy; ensuring adequate respiratory function through trach suctioning,
4 effective trach care and ventilator support based on signs and symptoms of
5 respiratory distress; checking ventilator settings as per the physician orders;
6 assessing Mr. Benison's lung fields, and assessing for clear, crackles, wheezing or
7 the absence of these in his breathing patterns; monitoring Mr. Benison's trach stoma
8 for signs and symptoms of infection; monitoring Mr. Benison's abdomen for signs
9 and symptoms of abdomen distention and constipation, and urinary tract infections;
10 and reporting significant findings and changes in Mr. Benison's condition as
11 appropriate.

12 **In-Home Nursing Authorization; Case Management and Habilitation Services**

13 95. As of September 2014, the cost to the Medi-Cal program for Mr.
14 Benison's home care, including 416 hours per month of private duty nursing, 260
15 hours of unlicensed IHSS aides and his medical equipment and supplies, was
16 approximately \$180,219.00 per year. This is his maximum budget for NF/AH
17 Waiver services because of the cost-cap imposed by DHCS.

18 96. Since January 2014, Mr. Benison's physician has ordered one-to-one
19 private duty nursing care for him so that he can receive the 24-hour care that he
20 needs to remain safely at home. Mr. Benison requested 24-hour nursing from
21 Defendants in February 2014. Defendants deferred his request for 24-hour nursing
22 and have not provided him with a written notice of action as to their decision.
23 However, because Mr. Benison lives on his own, he relies on an unlicensed live-in
24 IHSS aide as a backup care provider. In addition to the NF/AH Waiver cost cap
25 which would prevent Mr. Benison from receiving authorization for 24-hour nursing,
26 DHCS will also not authorize direct care services, or any combination of direct care
27 services, exceeding 24 hours of care per day under the NF/AH Waiver. NF/AH
28 Waiver at 196. Therefore, Plaintiff Benison needs 24 hours of nursing care per day,

1 but he also cannot give up his live-in backup caregiver. Thus, given the limitations
2 of the existing NF/AH Waiver rules, he is requesting additional hours per month of
3 nursing care to ensure that he can receive round-the-clock care.

4 97. Additionally, Mr. Benison needs Case Management Services and
5 Habilitation services to help him organize his nurses and IHSS workers' schedules,
6 enroll back in graduate studies, enable him to avail of social activities and
7 community services, and overall access a better quality of life. These services are
8 available through the NF/AH Waiver, but not available to Mr. Benison because of
9 the Subacute Waiver cost-cap.

10 **DEFENDANTS' ACTIONS PLACE PLAINTIFFS AT RISK OF**
11 **INSTITUTIONALIZATION**

12 98. According to Plaintiffs' medical professionals, home is the safest place
13 for them to maximize their health condition and prolong their lives. Placement in an
14 institution, however, will almost certainly cause health deterioration and possible
15 death within a short period of time.

16 99. Defendants are refusing to provide additional NF/AH Waiver services
17 for Plaintiffs solely due to the fact that DHCS has imposed a cost cap for the
18 Subacute level of care, which is without medical justification. Nor is it required by
19 federal law.

20 100. Defendants have placed an arbitrary cost-cap on home and community
21 based services at the Subacute level of care under the NF/AH Waiver, which is far
22 less than the actual institutional rate for a Subacute facility.

23 101. Defendants have great flexibility and discretion in their administration
24 of the NF/AH waiver. They have the authority to make modifications to ensure that
25 Medi-Cal recipients such as Plaintiffs receive sufficient and medically necessary
26 NF/AH Waiver services to avoid institutional placement and receive the necessary
27 services as their medical conditions require.

28 102. Plaintiffs' needs can be reasonably accommodated by Defendants

1 continuing to provide Plaintiffs with NF/AH Waiver services up to the rate that
2 Defendants would actually pay if Plaintiffs were to be admitted to a Subacute
3 facility; and/or modifying any of its Home and Community Based Waivers to permit
4 Plaintiffs to receive the NF/AH Waiver services that they require and that their
5 physicians ordered.

6 103. Defendants have the option to administer the NF/AH waiver so as not
7 to create a bias towards institutional placement. One option would be to increase
8 the cost-cap for the Subacute level of care of the NF/AH Waiver to a level that is
9 equal to the amount actually paid to Subacute facilities or utilize an aggregate cost
10 cap. Instead, Defendants have chosen to administer the waiver in such a way as to
11 discriminate against Plaintiffs and to place them at risk of institutional placement,
12 with life threatening consequences.

13 104. Without the appropriate level of NF/AH Waiver services to remain in
14 their homes, Plaintiffs will have no choice but institutional placement, which will
15 separate them from their family and community and also poses significant risks to
16 their health.

17 **VII. LEGAL CLAIMS**

18 **FIRST CLAIM FOR RELIEF**

19 **(Defendant Director Toby Douglas)**

20 **Americans with Disabilities Act, 42 U.S.C. § 12134-35 et seq.**

21 105. Plaintiffs reallege and incorporate herein by reference each and every
22 allegation and paragraph set forth previously.

23 106. Plaintiffs are “qualified individuals with a disability” within the
24 meaning of the ADA in that they (1) have a physical impairment that substantially
25 limits one or more major life activities; and (2) meet the essential eligibility
26 requirements for community-based long-term care under California’s Medicaid
27 program.

28 107. Defendant Toby Douglas is the Director of Defendant DHCS, which

1 has responsibility for providing Medi-Cal and state-funded home and community
2 based and institutional services, and is therefore a government entity subject to Title
3 II of the ADA. 42 USC §12131(1)(A) and (B).

4 108. Defendant's denial and reduction of adequate and medically necessary
5 in-home nursing, and failure to provide Plaintiffs with medically necessary NF/AH
6 Waiver services, has denied Plaintiffs the services they need to remain safely in the
7 community, thereby placing them at risk of institutionalization in violation of the
8 ADA's integration mandate.

9 109. Defendant has discriminated against Plaintiffs in ways that include
10 arbitrarily setting a cost-cap for the Subacute level of care of the NF/AH Waiver far
11 below the actual rate paid for institutional services in a Subacute facility, thus
12 denying Plaintiffs funds for home and community-based services that would
13 otherwise be available for institutional services.

14 110. Defendant has discriminated against Plaintiffs by failing to provide
15 reasonable modifications to programs and services in ways that include: failing to
16 increase the Subacute level of care cost-cap, within federal cost neutrality
17 limitations, to enable Plaintiffs to fund NF/AH Waiver services; and failing to offer
18 an exception to the Subacute level of care cost-cap that would enable Plaintiffs to
19 receive NF/AH Waiver services at a level adequate to meet their undisputed need.

20 111. By denying Plaintiffs adequate and necessary NF/AH Waiver services
21 commensurate with their actual need, as opposed to arbitrary service limitations,
22 Defendant has imposed eligibility requirements which unlawfully screens Plaintiffs
23 out from fully and equally enjoying NF/AH Waiver services, and from receiving
24 adequate care to remain safely at home.

25 112. Defendant has utilized criteria and methods of administration that
26 subject Plaintiffs to discrimination on the basis of disability, including risk of
27 unnecessary institutionalization, in ways that include: (1) designing and
28 implementing Home and Community Based Waivers which set arbitrarily low cost-

1 caps for NF/AH Waiver services, while paying significantly higher rates for the
2 institutional alternative; and (2) imposing eligibility criteria, cost limitations and
3 other criteria not required by federal limitations, which restrict in-home care in favor
4 of institutional care.

5 113. Defendant's actions are in violation of Title II of the ADA.

6 114. Pursuant to 42 U.S.C. § 12133, Plaintiffs are entitled to declaratory and
7 injunctive relief, as well as reasonable attorneys' fees and costs incurred in bringing
8 this action.

9 **SECOND CLAIM FOR RELIEF**

10 **(Defendant DHCS)**

11 **Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 *et seq.***

12 115. Plaintiffs reallege and incorporate herein by reference each and every
13 allegation and paragraph set forth previously.

14 116. Plaintiffs are "qualified individuals with a disability" within the
15 meaning of Section 504 in that their physical impairments substantially limits one or
16 more major life activities; and they meet the essential eligibility requirements in that
17 they are capable of living independently in their family home and/or in the most
18 integrated community setting possible, with assistance.

19 117. Defendant DHCS is a recipient of federal monies that provides Medi-
20 Cal home and community-based and institutional services and other Medi-Cal
21 services and is therefore a government entity subject to Section 504. 29 USC
22 794(b).

23 118. Defendant's denial and reduction of adequate and necessary in-home
24 nursing and refusal to provide NF/AH Waiver services has barred Plaintiffs from
25 receiving the services they need to continue to live in the community, thereby
26 placing them at imminent risk of institutionalization in violation of Section 504's
27 integration mandate.

28 119. Defendant DHCS discriminates against Plaintiffs in ways that include

1 setting a cost-cap for the Subacute level of care of the NF/AH Waiver far below the
2 actual rate paid for institutional services in a Subacute facility, thus denying
3 Plaintiffs funds for home and community-based services that would otherwise be
4 available for institutional services.

5 120. Defendant has discriminated against Plaintiffs by failing to provide
6 reasonable modifications to programs and services in ways that include: failing to
7 increase the Subacute level of care cost-cap, within federal cost neutrality
8 limitations, to enable Plaintiffs to receive medically necessary NF/AH Waiver
9 services; and failing to offer an exception to the Subacute level of care cost-cap that
10 would enable Plaintiffs to receive NF/AH Waiver services at a level adequate to
11 meet their undisputed needs.

12 121. By denying Plaintiffs adequate and necessary NF/AH Waiver services
13 commensurate with their actual need, as opposed to arbitrary service limitations,
14 Defendant has imposed eligibility requirements which unlawfully screen them out
15 from fully and equally enjoying in-home nursing services, and from receiving the
16 care they need to remain safely at home.

17 122. Defendant has utilized criteria and methods of administration that
18 subject Plaintiffs to discrimination on the basis of disability, including risk of
19 unnecessary institutionalization, by, including but not limited to the following: (1)
20 designing and implementing Home and Community Based Waivers which set
21 arbitrarily low cost-caps for NF/AH Waiver services, while paying significantly
22 higher rates for the institutional alternative; and (2) imposing eligibility criteria, cost
23 limitations and other criteria not required by federal limitations, which restrict in-
24 home care in favor of institutional care.

25 123. Defendant's actions violate Section 504.

26 **VIII. ALLEGATIONS CONCERNING INJUNCTIVE AND DECLARATORY**
27 **RELIEF**

28 124. Defendants' actions, as alleged herein, have resulted in, and will

1 continue to result in irreparable injury to Plaintiffs caused by the refusal to cover
2 medically necessary services under the NF/AH waiver as a result of the arbitrary
3 cost cap and which they need to remain at home with his family and avoid
4 unnecessary institutional placement. Plaintiffs have no plain, speedy or adequate
5 remedy at law.

6 125. An actual controversy exists between Plaintiffs and Defendants, in that
7 Plaintiffs claim that Defendants have violated their rights under the ADA, other
8 federal anti-discrimination laws, and Defendants deny all such contentions.

9 126. Defendant Douglas can either adopt or “alternate” (reject in whole or
10 part) any administrative decision arising out of claims against DHCS. California
11 Manual of Policies and Procedures, Sections 22-061 and 22-062. Therefore, the
12 administrative appeal process offers no remedy or protection to Plaintiffs, as the
13 Defendants in this action are the very entity which will make a determination of
14 what NF/AH Waiver services will be provided to Plaintiffs.

15 **IX. REQUEST FOR RELIEF**

16 WHEREFORE, Plaintiffs prays that the Court order the following relief and
17 remedies on behalf of themselves and all others similarly situated:

- 18 A. Assume jurisdiction over this action and maintain continuing
19 jurisdiction until Defendants are in full compliance with every order of this Court;
- 20 B. Declare that Defendants’ failure to authorize Plaintiffs with sufficient
21 NF/AH Waiver services to meet their undisputed needs, and Defendants’ policies,
22 practices, acts and omissions as set forth above, violate the American with
23 Disabilities Act, and Section 504 of the Rehabilitation Act.
- 24 C. Grant a temporary restraining order and preliminary injunction
25 enjoining Defendants, their officers, agents, employees, attorneys, and all persons
26 who are in active concert or participation with them from reducing medically
27 necessary Medi-Cal funded in-home care below Mr. Thomas’ current level of 450
28 hours per month of licensed vocational nursing care, 2 hours per month of RN care

1 and 240.04 hours per month of IHSS personal care services until such time as this
2 matter may be finally decided.

3 D. Grant a permanent injunction enjoining Defendants, their officers,
4 agents, employees, attorneys, and all persons who are in active concert or
5 participation with them from discriminating against Plaintiffs and thereby placing
6 them at risk of unnecessary institutionalization by:

- 7 i. Failing to offer reasonable modifications to their programs and
8 policies to enable Plaintiffs to receive medically necessary in-
9 home nursing as ordered by their physicians;
- 10 ii. Failing to offer reasonable modifications to their programs and
11 policies to enable Plaintiffs to receive other NF/AH Waiver
12 services like Case Management and Habilitation services;
- 13 iii. Imposing eligibility requirements which unlawfully screen
14 Plaintiffs out of the NF/AH Waiver program and prevent them
15 from fully and equally enjoying NF/AH Waiver services, and
16 from receiving adequate care to remain safely at home;
- 17 iv. Utilizing criteria and methods of administration that subject
18 Plaintiffs to discrimination on the basis of disability, including
19 placing them at risk of unnecessary institutionalization.

20 E. Issue an order requiring Defendants to authorize Plaintiffs with Medi-
21 Cal funded services through the Nursing Facility/Acute Hospital Waiver or other
22 appropriate Home and Community Based Waivers, subject to federal cost neutrality
23 requirements, to enable them to receive services commensurate with their needs, and
24 as identified by their treating physicians, and as medically necessary.

25 F. Retain jurisdiction over the Defendants until such time as the Court is
26 satisfied that Defendants' unlawful policies, practices, and acts complained of herein
27 cannot recur.

28 G. Award Plaintiffs the costs of this action and reasonable attorneys' fees

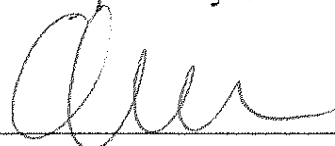
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pursuant to 20 U.S.C. § 794a; 42 U.S.C. §§ 1988, 12133, 12205; and as otherwise
may be allowed by law.

H. Grant such other and further relief as the Court deems to be just and
equitable.

Dated: October 15, 2014

Respectfully Submitted,

By: 

Elissa Gershon
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
CIVIL COVER SHEET

I. (a) PLAINTIFFS (Check box if you are representing yourself)

JERRY THOMAS, by and through his guardian ad litem BEVERLY THOMAS, ARTHUR CONGDON, SEAN BENISON

DEFENDANTS (Check box if you are representing yourself)

TOBY DOUGLAS, Director of the Department of Health Care Services, State of California DEPARTMENT OF HEALTH CARE SERVICES

(b) County of Residence of First Listed Plaintiff Orange County
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

(c) Attorneys (Firm Name, Address and Telephone Number) If you are representing yourself, provide the same information.

Monisha Coelho, Marilyn Holle, Betsy Havens, Disability Rights California, 350 South Bixel Street, Suite 290, Los Angeles, CA 90017, 213-213-8000
Elissa Gershon, Disability Rights California, 1330 Broadway, Suite 500, Oakland 94612

Attorneys (Firm Name, Address and Telephone Number) if you are representing yourself, provide the same information.

II. BASIS OF JURISDICTION (Place an X in one box only.)

1. U.S. Government Plaintiff

2. U.S. Government Defendant

3. Federal Question (U.S. Government Not a Party)

4. Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES-For Diversity Cases Only
(Place an X in one box for plaintiff and one for defendant)

Citizen of This State	PTF <input type="checkbox"/> 1	DEF <input type="checkbox"/> 1	Incorporated or Principal Place of Business in this State	PTF <input type="checkbox"/> 4	DEF <input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business in Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. ORIGIN (Place an X in one box only.)

1. Original Proceeding

2. Removed from State Court

3. Remanded from Appellate Court

4. Reinstated or Reopened

5. Transferred from Another District (Specify) _____

6. Multi-District Litigation

V. REQUESTED IN COMPLAINT: JURY DEMAND: Yes No (Check "Yes" only if demanded in complaint.)

CLASS ACTION under F.R.Cv.P. 23: Yes No **MONEY DEMANDED IN COMPLAINT:** 5

VI. CAUSE OF ACTION (Cite the U.S. Civil Statute under which you are filing and write a brief statement of cause. Do not cite jurisdictional statutes unless diversity.)
Plaintiffs allege that Defendants' actions violate the Americans with Disabilities Act of 1990, 42 U.S.C. § 12312 ("ADA") and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504").

VII. NATURE OF SUIT (Place an X in one box only.)

OTHER STATUTES	CONTRACT	REAL PROPERTY CONT.	IMMIGRATION	PRISONER PETITIONS	PROPERTY RIGHTS
<input type="checkbox"/> 375 False Claims Act	<input type="checkbox"/> 110 Insurance	<input type="checkbox"/> 240 Torts to Land	<input type="checkbox"/> 462 Naturalization Application	Habeas Corpus:	<input type="checkbox"/> 820 Copyrights
<input type="checkbox"/> 400 State Reapportionment	<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 245 Tort Product Liability	<input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 463 Alien Detainee	<input type="checkbox"/> 830 Patent
<input type="checkbox"/> 410 Antitrust	<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 290 All Other Real Property	TORTS	<input type="checkbox"/> 510 Motions to Vacate Sentence	<input type="checkbox"/> 840 Trademark
<input type="checkbox"/> 430 Banks and Banking	<input type="checkbox"/> 140 Negotiable Instrument	TORTS PERSONAL INJURY	<input type="checkbox"/> 370 Other Fraud	<input type="checkbox"/> 530 General	SOCIAL SECURITY
<input type="checkbox"/> 450 Commerce/ICC Rates/Etc.	<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 310 Airplane	PERSONAL PROPERTY	<input type="checkbox"/> 535 Death Penalty	<input type="checkbox"/> 861 HIA (1395ff)
<input type="checkbox"/> 460 Deportation	<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 371 Truth in Lending	Other:	<input type="checkbox"/> 862 Black Lung (923)
<input type="checkbox"/> 470 Racketeer Influenced & Corrupt Org.	<input type="checkbox"/> 152 Recovery of Defaulted Student Loan (Excl. Vet.)	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 380 Other Personal Property Damage	<input type="checkbox"/> 540 Mandamus/Other	<input type="checkbox"/> 863 DIWC/DIWW (405 (g))
<input type="checkbox"/> 480 Consumer Credit	<input type="checkbox"/> 153 Recovery of Overpayment of Vet. Benefits	<input type="checkbox"/> 330 Fed. Employers' Liability	<input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 550 Civil Rights	<input type="checkbox"/> 864 SSID Title XVI
<input type="checkbox"/> 490 Cable/Sat TV	<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 340 Marine	BANKRUPTCY	<input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 865 RSI (405 (g))
<input type="checkbox"/> 850 Securities/Commodities/Exchange	<input type="checkbox"/> 190 Other Contract	<input type="checkbox"/> 345 Marine Product Liability	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 560 Civil Detainee Conditions of Confinement	FEDERAL TAX SUITS
<input type="checkbox"/> 890 Other Statutory Actions	<input type="checkbox"/> 195 Contract Product Liability	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 423 Withdrawal 28 USC 157	FORFEITURE/PENALTY	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)
<input type="checkbox"/> 891 Agricultural Acts	<input type="checkbox"/> 196 Franchise	<input type="checkbox"/> 355 Motor Vehicle Product Liability	CIVIL RIGHTS	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881	<input type="checkbox"/> 871 IRS-Third Party 26 USC 7609
<input type="checkbox"/> 893 Environmental Matters	REAL PROPERTY	<input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 690 Other	LABOR
<input type="checkbox"/> 895 Freedom of Info. Act	<input type="checkbox"/> 210 Land Condemnation	<input type="checkbox"/> 362 Personal Injury-Med Malpractice	<input type="checkbox"/> 441 Voting	<input type="checkbox"/> 710 Fair Labor Standards Act	<input type="checkbox"/> 720 Labor/Mgmt. Relations
<input type="checkbox"/> 896 Arbitration	<input type="checkbox"/> 220 Foreclosure	<input type="checkbox"/> 365 Personal Injury-Product Liability	<input type="checkbox"/> 442 Employment	<input type="checkbox"/> 740 Railway Labor Act	<input type="checkbox"/> 751 Family and Medical Leave Act
<input type="checkbox"/> 899 Admin. Procedures Act/Review of Appeal of Agency Decision	<input type="checkbox"/> 230 Rent Lease & Ejectment	<input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability	<input type="checkbox"/> 443 Housing/Accommodations	<input type="checkbox"/> 790 Other Labor Litigation	<input type="checkbox"/> 791 Employee Ret. Inc. Security Act
<input type="checkbox"/> 950 Constitutionality of State Statutes		<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input checked="" type="checkbox"/> 446 American with Disabilities-Other		
		<input type="checkbox"/> 448 Education	<input type="checkbox"/> 448 Education		

**UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
CIVIL COVER SHEET**

VIII. VENUE: Your answers to the questions below will determine the division of the Court to which this case will be initially assigned. This initial assignment is subject to change, in accordance with the Court's General Orders, upon review by the Court of your Complaint or Notice of Removal.

<p>QUESTION A: Was this case removed from state court? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p> <p>If "no," skip to Question B. If "yes," check the box to the right that applies, enter the corresponding division in response to Question E, below, and continue from there.</p>	<p align="center">STATE CASE WAS PENDING IN THE COUNTY OF:</p> <input type="checkbox"/> Los Angeles, Ventura, Santa Barbara, or San Luis Obispo <input type="checkbox"/> Orange <input type="checkbox"/> Riverside or San Bernardino	<p align="center">INITIAL DIVISION IN CACD IS:</p> Western Southern Eastern
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<p>QUESTION B: Is the United States, or one of its agencies or employees, a PLAINTIFF in this action? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p> <p>If "no," skip to Question C. If "yes," answer Question B.1, at right.</p>	<p>B.1. Do 50% or more of the defendants who reside in the district reside in Orange Co.? check one of the boxes to the right →</p> <p>B.2. Do 50% or more of the defendants who reside in the district reside in Riverside and/or San Bernardino Counties? (Consider the two counties together.) check one of the boxes to the right →</p>	<p><input type="checkbox"/> YES. Your case will initially be assigned to the Southern Division. Enter "Southern" in response to Question E, below, and continue from there.</p> <p><input type="checkbox"/> NO. Continue to Question B.2.</p> <p><input type="checkbox"/> YES. Your case will initially be assigned to the Eastern Division. Enter "Eastern" in response to Question E, below, and continue from there.</p> <p><input type="checkbox"/> NO. Your case will initially be assigned to the Western Division. Enter "Western" in response to Question E, below, and continue from there.</p>
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<p>QUESTION C: Is the United States, or one of its agencies or employees, a DEFENDANT in this action? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p> <p>If "no," skip to Question D. If "yes," answer Question C.1, at right.</p>	<p>C.1. Do 50% or more of the plaintiffs who reside in the district reside in Orange Co.? check one of the boxes to the right →</p> <p>C.2. Do 50% or more of the plaintiffs who reside in the district reside in Riverside and/or San Bernardino Counties? (Consider the two counties together.) check one of the boxes to the right →</p>	<p><input type="checkbox"/> YES. Your case will initially be assigned to the Southern Division. Enter "Southern" in response to Question E, below, and continue from there.</p> <p><input type="checkbox"/> NO. Continue to Question C.2.</p> <p><input type="checkbox"/> YES. Your case will initially be assigned to the Eastern Division. Enter "Eastern" in response to Question E, below, and continue from there.</p> <p><input type="checkbox"/> NO. Your case will initially be assigned to the Western Division. Enter "Western" in response to Question E, below, and continue from there.</p>
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QUESTION D: Location of plaintiffs and defendants?	A. Orange County	B. Riverside or San Bernardino County	C. Los Angeles, Ventura, Santa Barbara, or San Luis Obispo County
Indicate the location(s) in which 50% or more of <i>plaintiffs who reside in this district</i> reside. (Check up to two boxes, or leave blank if none of these choices apply.)	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Indicate the location(s) in which 50% or more of <i>defendants who reside in this district</i> reside. (Check up to two boxes, or leave blank if none of these choices apply.)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

<p>D.1. Is there at least one answer in Column A? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p> <p>If "yes," your case will initially be assigned to the SOUTHERN DIVISION. Enter "Southern" in response to Question E, below, and continue from there. If "no," go to question D2 to the right. →</p>	<p>D.2. Is there at least one answer in Column B? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p> <p>If "yes," your case will initially be assigned to the EASTERN DIVISION. Enter "Eastern" in response to Question E, below. If "no," your case will be assigned to the WESTERN DIVISION. Enter "Western" in response to Question E, below. ↓</p>
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QUESTION E: Initial Division?	INITIAL DIVISION IN CACD
Enter the initial division determined by Question A, B, C, or D above: →	Western

QUESTION F: Northern Counties?
 Do 50% or more of plaintiffs or defendants in this district reside in Ventura, Santa Barbara, or San Luis Obispo counties? Yes No

**UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
CIVIL COVER SHEET**

IX(a). IDENTICAL CASES: Has this action been previously filed in this court?

NO YES

If yes, list case number(s): _____

IX(b). RELATED CASES: Is this case related (as defined below) to any cases previously filed in this court?

NO YES

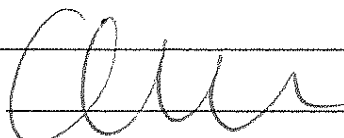
If yes, list case number(s): _____

Civil cases are related when they:

- A. Arise from the same or closely related transactions, happening, or event;
- B. Call for determination of the same or substantially related or similar questions of law and fact; or
- C. For other reasons would entail substantial duplication of labor if heard by different judges.

Check all boxes that apply. That cases may involve the same patent, trademark, or copyright is not, in itself, sufficient to deem cases related.

**X. SIGNATURE OF ATTORNEY
(OR SELF-REPRESENTED LITIGANT):**



DATE: 10/15/14

Notice to Counsel/Parties: The submission of this Civil Cover Sheet is required by Local Rule 3-1. This Form CV-71 and the information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. For more detailed instructions, see separate instruction sheet (CV-071A).

Key to Statistical codes relating to Social Security Cases:

Nature of Suit Code	Abbreviation	Substantive Statement of Cause of Action
861	HIA	All claims for health insurance benefits (Medicare) under Title 18, Part A, of the Social Security Act, as amended. Also, include claims by hospitals, skilled nursing facilities, etc., for certification as providers of services under the program. (42 U.S.C. 1935FF(b))
862	BL	All claims for "Black Lung" benefits under Title 4, Part B, of the Federal Coal Mine Health and Safety Act of 1969. (30 U.S.C. 923)
863	DIWC	All claims filed by insured workers for disability insurance benefits under Title 2 of the Social Security Act, as amended; plus all claims filed for child's insurance benefits based on disability. (42 U.S.C. 405 (g))
863	DIWW	All claims filed for widows or widowers insurance benefits based on disability under Title 2 of the Social Security Act, as amended. (42 U.S.C. 405 (g))
864	SSID	All claims for supplemental security income payments based upon disability filed under Title 16 of the Social Security Act, as amended.
865	RSI	All claims for retirement (old age) and survivors benefits under Title 2 of the Social Security Act, as amended. (42 U.S.C. 405 (g))